IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 891 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LILABHAI KHODABHAI BHARWAD & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YF MEHTA for Appellants
MR PD BHATE, ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date:28/12/2007

CAV JUDGMENT

1. This appeal is filed under Section 374[2] read with Section 386 of the Code of Criminal Procedure, challenging the legality and validity of

the order of conviction and sentence dated 7th August, 1993 passed by the learned Additional Sessions Judge, Ahmadabad[Rural] on conclusion of the trial of Sessions Case No. 101/88. Total 9 accused persons were tried for charge of offences punishable under Sections 143, 147, 148, 149, 34, 323, 324, 332, 353, 506[2], 426, 504 and 307 of I.P.C. and also under Section 135[1] of the Bombay Police Act. Pending the trial, the original accused no.2 Bhura Bhikha died his natural death and therefore, the trial against the said accused was treated as abated vide order dated 26th June, 1992 [Appellant no.2 Jivan Bhoja Bharwad died pending the appeal, so the appeal by the accused Jivan Bhoja shall have to be treated abated]. Learned trial Judge, by above judgment and order decided to acquit the accused nos. 6 to 9 from all charges levelled against them. The appellants, that is, the original accused nos. 1,3, 4 and 5 are the convicts, who have been held guilty for all the charges levelled against them except for the charge of offence punishable under Section 504 of I.P.C. and Section 135[1] of the Bombay Police Act. All the accused persons have been sentenced to undergo

rigorous imprisonment for 3 years for the charge of offences punishable under Sections 143, 147, 148 and 149 read with Section 307 of I.P.C., and to pay fine of Rs. 500/- each. In default of payment of fine, they have been sentenced to undergo simple imprisonment for 3 months. For the charge of offences punishable under Sections 143, 147, 148 read with Section 149 of I.P.C., they have been sentenced to undergo rigorous imprisonment for 6 months and to pay fine of Rs.800/- each and in default of payment of fine, they have been sentenced to simple imprisonment for 15 days. For the charge of offences punishable under Sections 147, 148, 149 read with Section 332 of I.P.C., they have also been sentenced to undergo rigorous imprisonment for 1 year and to pay fine of Rs. 200/- each and in default of payment of fine, they have been sentenced to undergo simple imprisonment for 15 days. For the charge of offences punishable under Section 149 of I.P.C., the above accused have been sentenced to undergo rigorous imprisonment for 3 months and to pay fine of Rs. 100/- each and in default of payment of fine, they have been sentenced to simple imprisonment for 15

days. For the charge of offences punishable under Sections 147, 148, 149 read with Section 323 of I.P.C., the above accused have been sentenced to undergo rigorous imprisonment for 3 months and to pay fine of Rs. 100/- each and in default of payment of fine, they have been sentenced to undergo simple imprisonment for 15 days. For the charge of offences punishable under Sections 147, 148 and 149 read with Section 324 of I.P.C., the above accused have been sentenced to undergo rigorous imprisonment for 6 months and to pay fine of Rs. 100/- each and in default of payment of fine, they have been sentenced to simple imprisonment of 15 days. For the charge of offences punishable under Sections 147 and 149 read with Section 506[2] of I.P.C. they have also been sentenced to undergo rigorous imprisonment for 6 months and to pay fine of Rs. 100/- each and in default of payment of fine, they have been sentenced to undergo simple imprisonment for 15 days. Similarly, they have been sentenced to undergo rigorous imprisonment for 3 months and to pay fine of Rs. 100/- each and in default of payment of fine, they have been sentenced to undergo simple

imprisonment for 15 days for the charge of offences punishable under Sections, 147, 148 and 149 read with Section 426 of I.P.C. The learned trial Judge has not awarded separate sentence for charge of offence punishable under Section 353 of I.P.C. All the sentences are ordered to run concurrently with benefit under Section 428, that is, of set off.

2. Legality and validity of the order of conviction and sentence has been assailed on various grounds mentioned in the memo of the appeal. I have heard Mr. Y.F. Mehta, learned counsel for the appellants and Mr. P.D.Bhate, learned APP in detail. Both of them have taken me through the relevant part of the judgment under challenge as well as oral and documentary evidence led during the course of the trial including the opinion evidence of the doctors examined by the prosecution.

3. At the outset, Mr. Mehta, learned counsel for the appellants informed the Court that in the incident in question, S.R.P. Constable Shivramsinh Malkansinh had opened fire from his 303 service

rifle, as a result of which, seven persons from the side of the accused had sustained injuries. Two persons, namely, Bharwad Chaku Bechar and Bharwad Ghela Bechar [two real brothers] had died on the spot. The accused no. 2 Jivan Bhojabhai had also sustained injuries along with original accused no.6, that is, acquitted accused Karman Khoda Bharwad. Similarly, original accused no.7 Laliben Matambhai, Maniben wife of appellant no.3 Rukhad Khoda [original accused no.4], original accused no.9 - Rangiben daughter of Becharbhai Karman and one minor boy, namely, Satish aged about 2 years son of Jivan Bhoja – accused no.2, had also received injuries in firing. However, it would be beneficial firstly to state the basic case that was placed by the prosecution against the persons who came to be charged.

4. It is alleged that the complainant, along with some prosecution witnesses were attacked with deadly weapons such as Dhariyas and sticks by Chaku Bechar, Ghela Bechar, Rukhad Khoda, Lila Khoda, Jivan Bhoja, Kanti Bechar, Bhura Jutha, Karman Khoda,

Laliben Matanbhai, Naniben Rukhadbhai, Rangiben Bhurabhai along with other 50 to 60 persons including males and females belonging to Bharwad community with their respective children. The incident had taken place at 8.30 a.m. on 23rd May, 1986 in Bharwad Vas of Piplaj village. According to the prosecution, about two years before, a quarrel had taken place between the two families of Bharwad community; one family was of original accused no.2 Bhura Jutha Bharwad and another family involved was of the complainant Karman Bhikha. That quarrel took ugly turn and one Vana Bhaga, close relative of the accused died. The appellant no.3 Rukhad Khoda had lodged FIR against the accused of that offence, that is, Bhikha Sava, father and two brothers of the complainant. The accused persons were tried for offences punishable under Section 302 I.P.C. read with other relevant sections and ultimately, the father and the two brothers of the complainant came to be convicted for the charge of offences punishable under Section 304 Part-I of I.P.C. The Court sentenced them to undergo rigorous imprisonment for 7 years. The convicts, that is, father and brothers of

the complainant of the present case filed an appeal in the High Court, but during the course of oral arguments, the parties arrived at compromise on some intervention and ultimately, the High Court maintained the conviction, however, reduced the substantive sentence to one and half year by imposing enhanced amount of fine. The High Court ordered to pay fine of Rs. 1,20,000/- directing that the amount be paid to the widow and children of the deceased Vana Bhaga, who succumbed to the injuries sustained by him in the said incident of 7.6.1984. According to the prosecution, even thereafter father and brothers of the present complainant who had paid the amount of Rs. 1,20,000/- on account of intervention, were insisting for return of the said amount from the widow and children of the deceased Vana Bhaga. Initially, ill-feeling had started and thereafter, it took a shape of dispute between the two families. According to the prosecution, as the complainant was apprehending assault, he had requested for police protection. Some physical quarrel had taken place earlier and accordingly, accepting the request of the complainant, family of the complainant was granted

protection and one S.R.P. Point was provided at village Piplaj to protect the complainant and his family. According to the prosecution, on the date of the incident in question. As per the prosecution, on all occasions, when any member of the family of the complainant was going out or to agricultural field, S.R.P. Constable was accompanying such member. On the date of the incident in question, at about 8.30 a.m., complainant Karsan Bhikha and his uncle Deva Sava were going to their agricultural field and S.R.P. Constable as accompanying them. It is alleged that the complainant's sister Paniben and Aunt Jiviben were following them. When the said four persons, that is, the complainant, his uncle, Paniben and Aunt Jiviben were passing on the road along with S.R.P. Constable and when they reached near the residence of the accused, the deceased Chaku Bechar and the deceased Ghela Bechar along with the appellants and other Bharwads armed with deadly weapons like Dhariyas and sticks, had arrived there, intercepted them and attacked the complainant and his uncle Deva Sava. According to the prosecution, the deceased Chaku Bechar and the deceased Ghela Bechar were

holding Dhariyas. Accused Lila Khoda and accused Bhura Jutha were holding sticks. Similarly, accused Kanti Bechar and accused Rukhad Khoda were also armed with sticks. The deceased Chaku Bechar gave a blow with Dhariya on the right shoulder and Ghela Bechar gave a blow with his Dhariya on the left hand of Deva Sava. They also assaulted S.R.P. Constable. He was given one blow with Dhariya on the butt of the rifle which was in the hand of S.R.P. Constable and also gave a blow which fell on the helmet of S.R.P. Constable Shivramsinh. According to prosecution, to protect the complainant and himself, the S.R.P. Constable opened fire, wherein, total three persons sustained grievous bullet injuries. Two of them died on the spot and the third, as submitted by Mr. Mehta died after some months as he was not able to recover from the effect and impact of the bullet injuries sustained by him. It is not disputed that other seven persons, including family and children had also sustained some other injuries or damage on account of the firing opened by the S.R.P. Constable Shivramsinh. It is the say of the prosecution that there was a mob of about 50 to 60

persons and therefore, the S.R.P. Constable Shivramsinh was compelled to intervene by opening fire. Initially, he fired one round in the air to get control over the mob. Thereafter, he was given Dhariya blow by deceased Chaku Bechar on his helmet as a result of which, his helmet was broken. Thereafter, the original accused nos. 4 and 5 started giving stick blows to the complainant and his uncle Deva Sava. Because of the bullet injuries, deceased Chaku Bechar and Ghela Bechar had fallen on the ground and had died on the spot. It is alleged that the other accused persons and members of the mob fled from the scene of offence. The nearest Vatva Police Station was informed and on arrival of the police jeep, S.R.P. Constable, the complainant, his uncle etc. were taken in the said jeep. Third person who had sustained bullet injuries was lying on the spot. Police Inspector Shri Kadri then immediately reached L.G.Hospital and took complaint of complainant Karsan Bhikha. He thereafter came to the spot of the incident and drew panchnama of the scene of offence. After the investigation, the police found that 9 persons along with 2 deceased were heading the mob of

about 50 to 60 persons and all of the said persons had committed the above said offences. The complainant, his uncle, S.R.P. Constable Shivramsinh, etc. were the victims of the assault made on them. Of course, the police charge sheeted only 9 persons and all of them were charged as aforesaid.

5. To bring home the charge, the prosecution has examined 30 witnesses along with 4 doctors, that is, Dr. Pradip exh.65, Dr.Dinesh exh.69, Dr. Pankaj exh.91 and Dr.Ramnik Singh exh.54. Report of the Forensic Science Laboratory [hereafter to be referred to as “FSL”] including the opinion given by the ballistic expert, Chemical Analyzer, and the serological opinion given by the officer who examined the muddamal articles, have been received in evidence during the deposition by the investigating officer – Police Inspector Shri Kadri [PW 30 exh.94].

6. Mr. Y.F. Mehta, learned counsel for the appellants has argued at length. The said arguments can be divided into six parts. Firstly, it is submitted that the prosecution has failed to prove

the genesis of the crime. According to him, the time of offence, i.e. 8.30 a.m. has not been correctly stated by the complainant. Similarly, the place of offence has also been wrongly described. It is submitted that merely because dead bodies of two persons were lying near Bharwad Vas who were shot at by S.R.P. Constable Shivramsinh, the prosecution has developed the theory that the incident had occurred in the vicinity where these bodies were lying and blood was found on the earth. There is no consistency in the evidence as to the names and number of the participants from the side of the accused, so also as to the role played by them. It is clear from the evidence that as such, no Dhariya was there at the scene of offence nor was it used. Use of this weapon being more dangerous, has been introduced by way of an afterthought. When it is possible to infer that Dhariya may have been introduced by the prosecution witnesses after some deliberations made interse, the prosecution theory ought not to have been accepted at all. The prosecution has also failed in leading evidence as to the motive, inimical terms between the two groups of Bharwad community. As such, even as

per the case of the prosecution, the accused side was being pressurized for refund of amount of Rs. 1,20,000/- and therefore, the quarrel was picked up by the complainant side. There is no evidence on the record to show that the accused persons were aggressors. On the contrary, the incident has occurred in the area where the accused persons reside. Even blood was found during the investigation in some of the residential houses of the accused persons. While drawing the panchnama of scene of offence, there was no reasonably good distance seen between the dead bodies that were lying on the road or in open space abutting the houses of the accused side and the respective residential houses of the persons named as accused at the time of charge sheeting them. It is also argued that there is conflict in the evidence as to the role attributed to the accused who have been held guilty. When prosecution admits that there was a big crowd of about 50 to 60 persons, then, the prosecution, at least, ought to have proved that how many persons were there in the family and how many friends were there on the side of the accused who resided in the

area where the incident had occurred. The prosecution witnesses, namely, complainant and his uncle were supposed to know practically all the persons of the other group, that is, the accused side. At the time when the statements were recorded by the investigating officer the above prosecution witnesses, at least, ought to have named the persons who were present in the crowd and at the earliest before the police. It is submitted that this infirmity rules out the theory of persons of big crowd armed with weapons like Lathis and Dhariyas. Undisputedly, there is no recovery of any Dhariya during the investigation either from the spot of the incident or from the accused. When it is the say of the prosecution that both the deceased persons were holding Dhariya and had used the same, then, normally, Dhariyas could have been found from near the bodies of the deceased accused, or the investigating officer would have recovered the same during the interrogation of the accused persons after their arrest. As such, there was no Dhariya before the Court. Obviously therefore, no Dhariya was sent for analysis to the FSL and the investigating

officer, at least, ought to have given reasonable explanation as to why he could not recover the muddamal Dhariyas that were actually used by both the deceased accused in assaulting the complainant, his uncle Deva Sava and the S.R.P. Constable Shivramsinh. The prosecution ought to have led the evidence as to at what time the S.R.P. Constable found it imminent to use the firm-arm given to him. It appears that more than one fire-arms were used, but the prosecution has tried to put the curtain on this aspect and in this situation, the prosecution was under obligation to place the chain of happenings of each event. On the contrary, the sequence of events placed by the prosecution is contradictory to some documents produced during the course of trial and all these aspects go to the root of the case put up by the prosecution.

7. The second fold of argument of Mr. Mehta is that it is well settled that the prosecution is supposed to examine independent witnesses if available. Similarly, the persons who have either knowledge or information as to the incident and are

capable to throw light on the material part of the incident/crime are also required to be examined. Even then, the prosecution has not examined one important witness Kaliben, who was a by-stander and who was eye witness to the incident. It is has come in the evidence that the cloth put on by Kaliben was recovered during the course of the investigation. Her presence at the spot of incident is undisputed. Her petticoat, popularly known as Chaniya, was found with one hole therein, which was possibly only by the hitting of bullet and despite the above fact, the prosecution has not examined her. She has not been attributed any role in the entire incident nor was she named as accused even during the course of the investigation. There was no reason for the prosecution for dropping this witness. Dropping of this witness Kaliben by the prosecution has resulted in serious prejudice to the defence of the accused. Similarly, it has come in evidence that one Police Sub Inspector Shri Khokhar had reached the scene of incident on receipt of the information about the incident. It has also come in evidence that once he had taken over the charge of S.R.P. Constable

Shivramsinh, he had recovered four used/fired cartridges from the said S.R.P. Constable. Therefore, it appears that before the complainant and the S.R.P. Constable Shivramsinh left the spot and reached Vatva Police Station in the police jeep, Police Sub Inspector Shri Khokhar had reached the spot of the incident. Thus, it is possible to infer that he must have seen the two dead bodies and one person lying on the spot of the incident with bullet injury. This police officer Shri Khokhar was material witness, because, true story about the incident must have been unfolded to him only, may be orally by the complainant and/or by the S.R.P. Constable Shivramsinh. However, this material witness has not been examined by the prosecution. Similarly, two other police officers, that is, P.S.I. Shri Solanki and P.S.I. Shri Patel, who had played important role during the investigation have not been examined by the prosecution. It is submitted that according to the prosecution, one S.R.P. Point was created so as to provide security to the complainant. This Point was created on the demand made by the side of the complainant. Therefore, there must be some other

S.R.P. Personnel. It has come in evidence that from the S.R.P. Personnel, one S.R.P. Constable was also always posted on that S.R.P. Point at village Piplaj and was always kept on duty. However, no other S.R.P. Constable has been examined. The evidence shows that L.G. Hospital had received the first injured at about 9.00 a.m. The distance between the village Piplaj and L.G. Hospital is reasonably more and somebody must have arranged for a vehicle for shifting the injured and taking them to the L.G. Hospital for their admission and treatment. When the first injured person had reached the L.G. Hospital at 9.00 a.m., then, the incident perhaps must have occurred between 7.30 a.m. and 8.00 a.m. Or around that time. This fact would have been brought on record in appropriate way to establish at least one fact that the investigation was fair and transparent. The Resident Medical Officer [R.M.O.] who had received the injured in the L.G. Hospital at about 9.00 a.m., was therefore required to be examined. Who was that injured, has remained a question mark. In all probability, that injured must be from the side of the accused. Therefore, the person who was taken to

the L.G. Hospital at about 9.00 a.m. must have been asked the history as to the injury sustained by the injured. Therefore, the case papers of the injured persons examined initially by the doctors at L.G. Hospital were important and relevant part of the evidence. Therefore, it is submitted that the R.M.O. who received the injured has not been examined nor the case papers of the treatment of the injured have been brought on the record. No reasonable investigation was even carried out by the investigating officer. Similarly, it has come in evidence that one police constable who was on duty at the L.G. Hospital had informed the police mobile. The evidence shows that the police constable on duty in the L.G. Hospital was anxious to have some more police force at the L.G. Hospital so that quarrel can be avoided in the L.G. Hospital as two rival groups were to reach L.G. Hospital for treatment on account of the injuries sustained by them. It appears that big mob must have rushed to the L.G. Hospital considering the number of the injured persons from the accused side. It is the case of the prosecution that from the side of the accused, two persons had

died and seven persons sustained injuries and most of the bullet injuries were caused by a fire-arm. Therefore, this police constable who was on Hospital duty was material witness who has not been examined. The evidence shows that Sarpanch of village Piplaj also has not been examined though he has also played some role and this witness had no reason to favour either of the group of the Bharwad community. Similarly, the doctors who treated the injured accused persons and other injured persons including the lady accused were important witnesses, because, it was the duty of each such doctor to ask the history as to the injuries sustained by the injured accused persons. Similarly, it was obligatory on the part of the injured to tell the history to the doctor in medico-legal case. The case papers of all injured persons have not been either brought on record nor proved by the doctors. True it is that the doctors who examined and treated the prosecution witnesses and had simultaneously examined and treated some of the accused persons named in the charge sheet are examined, but the fact remains that some doctors who had treated other injured persons have not been

examined by the prosecution.

8. Third fold of argument advanced by Mr. Mehta is that when prosecution has attempted to justify that the accused persons were assailants and S.R.P. Constable Shivramsinh was compelled to resort to firing, then, proper background was required to be brought on record by leading reliable evidence otherwise, it would not be either legal or proper to say that the accused were assailants. On the contrary, circumstances speak that persons from the side of the accused were actual victims of the planned assault made on them otherwise, young ladies and minor children may not have sustained bullet injuries. It is submitted that the attack with use of Dhariya is highly impossible, because, length of Dhariya would not be more than 4 to 6 feet and bullet injuries seen on the person of the deceased accused show that the firing must have created distance of more than 15 to 25 feet otherwise, exit wound would not have been of the size that was found by the doctor at the time of performing autopsy. Similarly, there is no evidence as to infliction of

serious injuries to any of the prosecution witnesses prior to the use of the fire-arm. When prosecution says that prior to use of fire-arm by pointing the rifle at the side of accused, one round of fire was made in air. When it is the case of the prosecution that total four rounds were fired and one such round was fire in air, then, the prosecution was supposed to give account as to how as many as nine persons could sustain bullet injuries by fire-arm, including two deceased and one injured who was lying on the spot immediately after the incident. Description in the mob and the panchnama, that is, sketch [page 393 of the paper book] and the map [exh.89 page 611 of the paper book] indicates that the deceased were shot at when both of them were in their Maholla and near their respect houses. As such, there is no road/way through the Maholla of the accused side which can lead to the agricultural field of the complainant or his uncle. The prosecution witnesses can reach their respective field through highway and that road was being used everyday. Even S.R.P. Constable himself has stated that they were passing on the road. The road described by the

prosecution witnesses including S.R.P. Constable is reflected in the panchnama of the scene of offence as well as the map drawn by Revenue Circle Inspector Shri Girdharbhai A. Patel [P.W. 28, exh.87]. If the complainant, his uncle and S.R.P. Constable Shivramsinh were passing through the road mentioned in the panchnama, then, it would not have been possible for the accused persons to intercept the complainant and other persons of his side, unless the accused persons go on the road and pick up a quarrel. When the dead bodies of the two deceased accused were found in their respective residential area, then, the prosecution ought to have explained the situation that how they were lying near their houses when the panchnama was drawn. Considering the 303 bullet injuries in the middle of chest-upper portion of body sustained by both the deceased, it was not possible for them to run, nor is that the say of the prosecution. Mr. Mehta submitted that the evidence led by the prosecution clearly speaks that Police Sub Inspector Khokhar had recovered the fire-arm, used cartridges from S.R.P. Constable Shivramsinh at about 9.20 a.m. on the date of the incident. According to

Police Inspector Shri Kadri, used cartridges were recovered from the S.R.P. Constable Shivramsinh in the evening. The prosecution, in this factual complicated contingency was supposed to explain that how cartridges went back to S.R.P. Constable Shivramsinh or how they were found with S.R.P. Constable Shivramsinh when they were recovered by Police Inspector Mr. Kadri from him. It appears that to save the S.R.P. Constable Shivramsinh from serious offence, theory of assault on S.R.P. Constable Shivramsinh, complainant and others has been created or has been exaggerated. One circumstance has come on the record which suggests that one of the S.R.P. Constables was once given a slap from the side of the accused and therefore, the S.R.P. Constables posted on the Point to maintain law and order situation to protect the complainant, were harbouring some inimical feelings. This incident had occurred sometime prior to the date of the incident. It is not the case nor is it suggested by the defence that slap was given to S.R.P. Constable Shivramsinh. However, the learned trial Judge was supposed to appreciate the evidence in the background of the

totality and scope of false implication of the accused persons in serious offences. It emerges that the accused persons were the victims and this aspect has been ignored by the learned trial Judge.

9. Fourth fold of the argument of Mr. Mehta is that the prosecution has examined only the interested witnesses to bring home the charge. According to him, the material witnesses examined by the prosecution had attempted to impress upon the Court that they were telling the Court the entire story truthfully, but in reality, their versions are not trustworthy. Evidence of some police witnesses examined, including Police Inspector Shri Kadri does not carry the case of the prosecution further. The fact that S.R.P. Constable Shivramsinh was responsible for shooting dead the two persons has been believed and the learned trial Judge has considered his say as trustworthy. Delay in lodging FIR for some hours appears to be a big gap in between the time, that is, 9.20 a.m. and 12.30 p.m. The complainant and prosecution witnesses were able to carve out the story favourable to them mainly to the assailant

S.R.P. Constable Shivramsinh. It has come in evidence that P.S.I. Shri Khokhar had reached at the scene of incident, that is, Bharwad Vas in Piplaj village at 9.20 a.m. He was competent to record the complaint, however, in the present case, the actual complaint which has been produced before the Court as FIR was reduced in writing by P.I. Shri Kadri in L.G. Hospital at 12.30 p.m. Therefore, it was possible even for the investigating officer to select the witnesses and to record the statements of witnesses accordingly so that the complainant gets sufficient corroboration. Pamiben and Deva Sava cannot be said to be incidental witnesses. Great care and caution was required to be taken at the time of evaluating their evidence as they being partisan witnesses. The gap left by the investigating officer should be viewed seriously if material lacunae are found therein. Similarly, conduct of the investigating officer Shri Kadri and the conduct of other police officers, namely Shri Devare, Shri Solanki and Shri Khokhar is unlike the police officers. They ought not to have attempted to shield or save the S.R.P. Constable Shivramsinh or any of the persons from the

complainant side merely because one of the S.R.P. Constables was slapped by a lady from the accused side. Therefore, according to Mr. Mehta, this is a case in which conviction is based on the evidence of interested witnesses. True it is that the evidence of partisan witness cannot be ignored totally. But while evaluating the evidence of such witness or witnesses, the Court should try to seek some piece of corroborative evidence and there should not be material contradiction or interse conflicts in the evidence of such witnesses. It would be risky to place reliance on the evidence of the interested witnesses having material infirmities. In the present case, the learned trial Judge ought to have discarded the evidence of the complainant, his uncle Deva Sava, Pamiben and S.R.P. Constable Shivramsinh. On the contrary, S.R.P. Constable Shivramsinh was required to be branded as a liar and the learned trial Judge ought to have held the said S.R.P. Constable responsible for suppressing the real story. The complainant being inimical to the accused, he may not state correct facts but nobody had prevented the S.R.P. Constable Shivramsinh from telling the true

story that why he opened fire and that too at the time when he and the prosecution witnesses including the complainant were reasonably at safe distance. It is not the case of the prosecution that the mob was pelting big stones and any of the prosecution witnesses sustained injuries because of the stone pelting. This, according to Mr.Mehta is crucial aspect and falsifies the story of the prosecution.

10. Next fold of the argument of Mr. Mehta is that though no specific plea of private defence in plain words was placed before the trial Judge, but considering the facts and circumstances emerging from the records, the accused could have benefit of resorting to right of defence. It is possible that to save respective lives in the assault made from the complainant and his uncle, some of the accused persons may have retaliated. During such quarrel, S.R.P. Constable Shivramsinh was not required to resort to such serious firing resulting into bullet injuries to about 9 persons including the two deceased accused. It is not necessary to take a plea of private defence specifically on the strength of

the evidence on record and when there is no dispute of one fact that two groups of Bharwad families were inimical to each other since years, the accused persons could have been given at least benefit of doubt. According to Mr. Mehta, this argument is alternative argument and the same has been placed before the Court without prejudice to other basic arguments advanced. In support of the arguments advanced on the plea of private defence, Mr. Mehta has placed reliance on the following decisions of the Hon'ble Supreme Court:-

[1] Shahjahan Vs. State of Kerala, reported in MANU S.C. 2007 1094.

[2] Krishna Vs. State of U.P. reported in MANU SC 2007 2781.

[3] Magan Vs. State of M.P., reported in MANU SC 7288.

[4] Raj Pal Vs. State of Haryana, reported in MANU SC 2007 7348.

[5] Shaikh Rafi Vs. State of A.P., reported in MANU SC 2007 7322.

11. Dyeing declaration of Jivan Bhoja [original accused no.3] was recorded. Statement of Jivan Bhoja being the statement of the accused, was not required to be placed in the papers of the charge sheet but such statement, when was recorded by independent witness like Executive Magistrate, the same ought to have been considered by the investigating officer Shri Kadri, and to show that the investigation is transparent, the person who recorded the statement of Jivan Bhoja ought to have been cited as a witness and the copy thereof also ought to have been provided to the accused. According to Mr. Mehta, dying declaration of Jivan Bhoja was a good piece of evidence. In support of this argument, he has placed reliance upon the decision of the Hon'ble Supreme Court in the case of **State of M.P. Vs. Ram Sevak, reported in MANU SC 2007 1180**. It is the duty of the prosecution to place specific theory as to how and why particular crime has been committed and who is the person responsible for the criminal wrong. Substratum of the story of the prosecution must emerge from the FIR, that is, the complaint recorded in first point of time. Here, in the present case,

the complaint is not lodged timely. Even then, the prosecution has failed in establishing satisfactorily beyond reasonable doubt that the accused persons had committed alleged offences in the manner in which it was stated in the complaint. Crucial part of the entire incident is not mentioned in the complaint. This has happened because complaint of Karsan Bhikha Bharwad was recorded instead of S.R.P. Constable Shivramsinh or any other S.R.P. Constable posted on duty at the S.R.P. Point created for particular purpose. Placing reliance upon the decision of the Hon'ble Apex Court in the case of **Sachdev Tiwari Vs. State of U.P., reported in AIR 2004 SC 5039**, it is submitted that the prosecution is under obligation to prove the substratum of the story of the case placed beyond reasonable doubt and this is possible only by leading cogent and convincing evidence. Mr. Mehta is mainly relying upon the observations made by the Hon'ble Apex Court in para-7 of the said judgment. It would be beneficial to quote relevant part of para-7 of the said judgment as under:

> *“7. Coming to the plea of the accused that PW-2 was 'chance witness' who has not*

> *explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as 'chance witness' it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. The courts below have scanned the evidence of PW-2 in great detail and found it to be reliable. We find no reason to differ."*

Similarly, he has placed reliance upon the observations made by the Apex Court in the case of **Ashish Batham Vs. State of M.P., reported in AIR 2002 SC 3206.**

12. In the last fold of the argument, Mr.Mehta has attempted to point out certain infirmities and

material lacunae left during the course of the trial. It is submitted that S.R.P. Constable Shivramsinh being a public servant and on duty was authorized to use fire-arm and therefore, this witness was under an obligation to explain as to why he opened fire. It has come in evidence that S.R.P. Constable Shivramsinh was armed with 303 service rifle and that total 20 cartridges were with him. This witness ought to have given account of live cartridges that remained with him, because, with the use of only three bullets, there would not be death of two persons and injury to one more person who was found lying there on the spot and ultimately survived for some period on receiving treatment. Along with six other injured persons, a hole that was found in the petticoat of Kaliben proves that at least one bullet had passed through that petticoat safely without causing any injury to her. It is possible to imagine the height at which the bullet must have travelled while passing through the petticoat of Kaliben. None of the two deceased have succumbed to the injuries due to injuries received on their leg or thigh, but they died instantaneously due

to bullet hit in the middle of chest. Therefore, the bullet that passed through the petticoat of Kaliben does not appear to be responsible for causing death of any of the two deceased who succumbed to the bullet injury. One bullet fired from 303 rifle can cause injury to number persons provided the injured persons are in a row. But here males, females and children standing at different angle have sustained injuries with a fire-arm. The prosecution witnesses were supposed to explain as to how these many number of persons sustained bleeding injuries. Non-explanation of the injuries found on the body of the accused and other six persons by the prosecution witnesses makes the prosecution case doubtful. True it is that the prosecution is not under legal obligation to tender satisfactory explanation but probable explanation at least should be given mainly in cases of injuries caused in the same incident when they are otherwise bleeding and/or visible.

13. It is also submitted that there is no explanation as to how blood was found in some of the residential houses, why detailed panchnama of the

surrounding houses was not prepared meticulously. It was necessary to record further statements of the complainant as well as S.R.P. Constable Shivramsinh after collecting medical certificates of seven injured surviving persons, but no such exercise has been undertaken. The authority who had allotted 303 service rifle with ammunition to the S.R.P. Constable Shivramsinh ought to have been examined by the prosecution. The investigation officer was under an obligation to give account of the total bullets used, by producing relevant record from the State Reserve Police Force. Expert opinion says that out of four muddamal cartridges sent for analysis, three were found fired from 303 service rifle recovered during the course of the investigation from S.R.P. Constable Shivramsinh. It was the duty of the investigating officer to ascertain that who fired the 4th round of 303 bullet and from which weapon? According to Mr. Mehta, one more weapon appears to have been used apart from the weapon [303 service rifle]. In the present case, the 4th cartridge sent for analysis perhaps was fired from one another weapon. Non-recovery of such weapon and sufficient number of used

cartridges vis-a-vis injuries that were seen on the body of the other injured persons makes the case of the prosecution doubtful and the investigation unfair. Similarly, according to Mr. Mehta, the injuries on the body of the complainant and his uncle Deva Sava were not so grave like the accused persons and two minor children. Panchnama of recovery of 303 service rifle from the S.R.P. Constable Shivramsinh suggests that the rifle was not broken. One cannot use or fire from 303 rifle if the butt portion of the said rifle is broken. Similarly, damaged helmet does not indicate that Dharia blow must have fallen on the head of S.R.P. Constable Shivramsinh. According to Mr. Mehta, normally, S.R.P. Constables are not wearing helmets. Even during their duties, they are found wearing caps. What tempted S.R.P. Constable Shivramsinh to wear helmet on that day was that he was anticipating blow on his head which is a question to be considered. For the sake of argument, even if it is accepted that he may have put on helmet, then, some injuries could have been seen on the head of the S.R.P. Constable, but no such head injury was noticed by the doctor who treated the S.R.P.

Constable Shivramsinh in L.G. Hospital. Injuries found on the body of the complainant, his uncle Deva Sava and S.R.P. Constable Shivramsinh were simple. Mr. Mehta has alleged that to carve out a case against the accused persons and to save S.R.P. Constable Shivramsinh, prosecution witnesses including the complainant have created marks of injuries otherwise, there would not be any injury on the back portion of any of the prosecution witnesses. Perhaps, lathi allotted to the S.R.P. Constable Shivramsinh was used to create evidence of injuries on the body of these three witnesses. But as there is no investigation in that direction, prejudice is caused to the case of the defence side. Photographs are examined vide Exh. 83 but the photographs of crucial portion were perhaps not taken. Similarly, two sketches were produced before the learned trial Judge and it is not possible from this evidence to infer that the complainant, his uncle and S.R.P. Constable Shivramsinh were supposed to pass through the residential area of the accused persons to reach to their respective fields. Detailed village map ought to have been produced. It

gives an impression that headstrong S.R.P. Constable Shivramsinh, complainant and his uncle Deva Sava had attempted to enter into the area of the accused persons with ulterior motive. The complainant, his uncle Deva Sava and S.R.P. Constable Shivramsinh were assailants in true sense. It is clear that as P.S.I. Shri Khokhar had detained S.R.P.Constable Shivramsinh for some time at about 8.30 a.m. he has not been examined so that he may not have to face cross-examination by the defence side. The investigating officer ought to have recovered the remaining live cartridges also to impress upon the Court that no bullets other than four as stated by the prosecution were fired. The injured persons are members of practically one family and their residential houses are also in the area where the incident occurred. In that situation, the learned trial Judge ought not to have branded the accused persons as members of unlawful assembly nor they could have been treated as assailants. Their presence on the spot of the incident was so natural. When no Dharia has been recovered in the incident, none of the prosecution witnesses ought to have believed that Dharia was ever

used by any of the accused. For short, this is a case full of infirmities and the conviction recorded by the learned trial Judge therefore, requires to be reversed.

14. One more argument advanced by Mr. Mehta is that this Court, as an exceptional case, while acquitting the accused persons should direct the State Government to award compensation to the family of the deceased persons and all injured persons and should also observe that S.R.P. Constable Shivramsinh had recklessly fired from his 303 service rifle towards the accused and their family members including children. It is submitted that this Court should also observe that such wrong is a criminal wrong and that fresh offence against the S.R.P. Constable Shivramsinh should be recorded and the complainant and his uncle Deva Sava should be joined as accused or atleast, this Court should direct the State Government to initiate departmental proceedings against the S.R.P.Constable Shivramsinh if he is in service. Similarly, this Court should also direct the State Government to award reasonable amount of

compensation to the dependents of the deceased persons who succumbed to their injuries caused by bullets fired from 303 service rifle by S.R.P. Constable Shivramsinh. It is also submitted that this Court should also direct the State Government to evolve a scheme as to what amount of compensation can be given to the deceased who lose life in reckless police firings and that such policy should be adopted for quantifying the ex-gratia compensation. In support of his submission, Mr. Mehta has placed reliance upon the decision of the Hon'ble Supreme Court in the case of **State of Punjab & others Vs. Kuldip Singh reported in [2007] 6 Supreme Court Cases 218**. The facts of the said case, according to Mr. Mehta, are different but his say is that this Court, irrespective of the scheme of Section 357 of the Code of Criminal Procedure, can direct the State Government in exercise of is inherent powers under Section 482 of the Code of Criminal Procedure.

15. In response to the arguments advanced by Mr. Mehta, the learned APP Shri P.D. Bhate has submitted

that this is a case of assault on a public servant by a mob including the accused persons who were charge sheeted. Mr. Bhate has made detailed submissions which can be stated in nutshell as under:-

[1] This is not a case of delay in lodging FIR, because, P.I. Shri Kadri had rushed to the hospital on receipt of the information as to the quarrel between two groups of Bharwad community and time of incident is shown to be 8.30 a.m. It was the duty of P.I. Shri Kadri to see that security arrangements were made at village Piplaj and after managing for the same, he has recorded the complaint. Therefore, this is not a case of delayed FIR or deliberate delay in registering the FIR and therefore, the argument advanced by Mr. Mehta on this count may not be accepted.

[2] Three witnesses, even if the version of Pamiben is ignored, inspires confidence. These witnesses are injured witnesses and there was no reason for the learned trial Judge to discard their evidence especially when they have given evidence

consistent with the story emerging from the FIR. Contradictions or some improvement made by these witnesses makes their version natural. Prosecution witnesses are not supposed to tell parrot like story. Injuries on their body make them natural witnesses to the incident and the learned trial Judge, therefore, was right in accepting the evidence of the complainant, his uncle Deva Sava and mainly S.R.P. Constable Shivramsinh.

[3] It is an undisputed fact that there was animosity between two groups of Bharwad, that is, one group of the complainant side and another from the accused side. The complainant was granted police protection since long and therefore, on the date of the incident, deliberate attempt of assault was made by the group belonging to the accused side. It is submitted that merely because some families or children were there and some of them sustained injuries would not make prosecution case doubtful. On the contrary, it is impossible to infer that the accused side has tried to use the families from their side in assaulting the complainant and his uncle.

[4] S.R.P. Constable Shivramsinh has performed

his duty, he being uniformed person, accused persons ought not to have even touched him. There is consistent evidence that Dhariya blow was given on the head of S.R.P. Constable Shivramsinh. Even then, by way of abundant caution, first round was fired in the air. That the accused persons were armed with deadly weapons like Dhariya, lathi etc. and they were in large number. Therefore, on one side, when there were only three persons, there was no option for S.R.P. Constable Shivramsinh to open fire from 303 service rifle allotted to him. There is no lacuna or infirmity in the evidence. However, non-recovery of Dhariya or live cartridges or non-settlement of account as to the use of cartridges, cannot be said to be material infirmity. It is very likely that the group of the accused persons or their family members may have removed Dhariya from the spot which was in the hands of both the deceased accused. That the police may not have acted harshly with the family members of the two deceased accused as two young persons had lost their lives in the incident in question. That under some sympathy, the police may not have acted ruthlessly to recover Dhariya from the

accused. When the witnesses who were injured witnesses, were able to prove the offence satisfactorily, the prosecution may not examine all witnesses to the incident and for this reason, the prosecution may have decided to drop Kaliben as prosecution witness. That nobody had prevented the accused persons from examining Kaliben as their witness.

[5] There is no cogent evidence forthcoming on the record to show that Police Sub Inspector Shri Khokhar had detained S.R.P. Constable Shivramsinh and had recovered four cartridges from him initially. It is very likely that to ascertain the correctness of the incident in question vis-a-vis the sensitivity of the incident, he may have provided protection to S.R.P. Constable Shivramsinh and may have recovered four used cartridges after reaching at the spot of the incident. But ultimately, he had rushed to the spot being an officer on duty with his mobile van. P.S.I. Shri Khokhar may have asked the complainant to go to the police station and lodge a complaint. It has come in the evidence that the complainant as well as S.R.P. Constable Shivramsinh had reached the

police station initially but as both of them were injured, they were asked to go to the hospital and Police Inspector Shri Kadri has thereafter recorded the complaint. Therefore, as such, there is no infirmity in the story of the prosecution nor there are material contradictions or improvements that can be considered as contradiction in the evidence led by the prosecution.

[6] That the order of conviction is a reasoned order and no material error is found in appreciation of evidence. Ultimately, the Judge who has recorded the evidence has recorded ultimate finding. The learned trial Judge has an opportunity to notice the demeanor of the prosecution witnesses examined and when the learned trial Judge finds that there is ring of truth in the version of the complainant, his uncle Deva Sava and S.R.P. Constable Shivramsinh, then, he can record a finding as to the establishment of guilt and from that angle, the judgment under challenge should be viewed and appreciated. In short, according to Mr. Bhate, the appeal deserves dismissal and conviction recorded by the learned trial Judge deserves to be confirmed.

16. In view of the rival submissions and the stand taken by the accused persons in their statements recorded under Section 313 of the Code of Criminal Procedure, firstly it would be relevant to note that the prosecution mainly relies upon the evidence of S.R.P. Personnel examined and three other witnesses, that is, the complainant, his uncle Deva Sava and one lady who claims to be one of the two female members of the family of the complainant who were following the complainant and his uncle Deva Sava under the protection of S.R.P. Constable Shivramsinh. Learned trial Judge has recorded the conviction mainly placing reliance upon the evidence of the injured witnesses and the evidence as to the motive pleaded by the prosecution.

17. Evidence of P.W.1 Roopsing Raising [Exh.25] reveals that he was member of the S.R.P. Group Company “C” and was posted on duty at Bharwad Vas at Piplaj on 23rd May, 1986 along with Mangilal S.R.P. Head Constable, Shivramsinh S.R.P. Constable, Kantibhai Amrabhai Parmar, Constables Dalpatsinh

Gohel, Dalpatsinh Chauhan, Dhokda Ram and Driver Nandkishor Mishra. This witness was, therefore, on duty since 20th May, 1986 at the S.R.P. Point in Bharwad Vas. This witness has stated that they were apprised that there are two groups in Bharwad community at Piplaj and both groups are inimical to each other and therefore, they [S.R.P. Personnel] were told to keep watch and see that no untoward incident occurs. It is stated by this witness that all of them had gone to Piplaj to resume their duties on 20th May, 1986 in a police van. He has stated that S.R.P. Constable were sent under the leadership of one Head Constable and that he [this witness] was at the Point at about 8.30 a.m. on the date of the incident. According to this witness, some members of Bharwad community had demanded protection and therefore, S.R.P. Head Constable Mangiram had deputed S.R.P. Constable Shivramsinh to accompany the Bharwads. This witness has stated that two persons from Bharwad community along with one S.R.P. Constable had started in a bullock cart and two females were following their cart. After some time, the lady and the girl who were following the bullock

cart had rushed to the S.R.P. Point and informed the personnel that other group of Bharwads had assaulted them and the persons from the said group were following the orders given by S.R.P. Constable accompanying the two Bharwads and that the assailants had assaulted them with Dhariyas and lathis etc and both of the said ladies were requesting him to send help. Therefore, Head Constable Mangilal deputed this witness, S.R.P. Constable Dalpatsinh Chauhan and Dhokla Ram. All the three, after taking their 303 service rifles had proceeded towards the scene of the incident. S.R.P. Constable who was accompanying the Bharwads to provide protection was also armed 303 service rifle. This witness has stated that when they were about to reach the spot, they had seen 50 to 60 persons, but before they could reach the said place, the mob had fled from the spot. This witness has stated that three persons were lying there. He has stated that all the three persons who were lying there were of the other group of Bharwads. S.R.P. Constable Shivramsinh was there. He was injured with Lathi. S.R.P. Constable Shivramsinh along with one young Bharwad was there and that young Bharwad

boy had sustained injury with Dhariya on his shoulder. He was bleeding and one other elder Bharwad had sustained injury on his head who was also bleeding. This witness has further stated that when they reached the spot, both ladies who had followed the bullock cart initially were also with them and at that time, two other Bharwads were also there. He has stated that thereafter, he brought the injured Bharwads at the S.R.P. Point. Both the females were also brought at the S.R.P. Point. He had thereafter informed Mangilal about the incident and rushed to see that the injured persons are sent to Hospital. It is clear from the reading of the entire set of evidence that this witness refers to the complainant as young Bharwad boy and his uncle Deva Sava as elder Bharwad and Bai Pamiben is referred as Bharwad girl. Reading of the answers given by this witness during the course of the cross examination makes the evidence of this witness strange. It is the prosecution case that the rifle which was there with S.R.P. Constable Shivramsinh was broken in the assault made on him. However, in his examination in chief, this witness has stated that he had learnt

subsequently about the damage caused to the rifle. He has admitted in the cross-examination that he had not seen the broken or damaged rifle. Surprisingly, when this witness had brought the injured persons at the S.R.P. Point, three other S.R.P. Constables were present at the S.R.P. Point. He has admitted that before he could reach the spot of the incident, the incident had already taken place and he had not witnessed the incident. This witness, even is not recollecting as to when his statement was recorded by the police. He has stated that three persons were lying there, one of them was trying to keep away the bees. He has stated that the said man was at a distance of about 15 feet from the road. The other two were also lying there. He has stated that there was a building at a distance of about 15 feet from that spot. In the police statement, this witness has stated that Chaku Bechar and Ghela Bechar had died because of the bullet injury. He has admitted that he has stated in his police statement that other three males, three females and one child had also sustained injuries. However, he has admitted that he has not stated these facts on the observation

made by him, but these facts were stated by him on the strength of the information that he had received after the arrival of police mobile van. He has stated that he had seen the blood on the body of the injured persons and not on the earth. He has denied the suggestion that at about 8.00 a.m. S.R.P. Constable had gone at the house of Karsan Bhikha and Bhura Jutha and had spat at them. At that time, Bhura Jutha had strongly reacted. This witness has denied that Karsan Bhikha and Bhura Jutha were threatened by the S.R.P. Constable that he would see to them. The witness has also denied that about ten minutes thereafter, an assault was made on Lila Khoda and Bhura Jutha and others. However, this witness has stated that he may not recollect the name of the Bharwads because of the time gap [that is, the time gap between the period of the first date and deposition being given in the Court]. However, he has stated that he does not recollect whether Jivan Bhoja was there or not. He has denied the suggestion that the complainant's side had instigated him to shoot at Jivan Bhoja. This witness has also denied that at that time, Jivan Bhoja was carrying bale of grass on

his head. This witness has denied that Jivan Bhoja was shot by S.R.P. Constable and on hearing the gun shots, other persons who were there in their respective houses had come out and at that time, the persons from the complainant's side and S.R.P. Constable had assaulted the accused persons. This witness has denied that he had fired towards the families of the accused side, that is, Nani Rukhad, Laliben Rangiben, Rukhad Khoda and one child, namely, Satish aged about 2 years. He has denied that he had given lathi blow to Kanti Bechar. This witness has made material improvement in the manner in which initially the complainant, his uncle Deva Sava and both females had proceeded along with S.R.P. Constable Shivramsinh to the effect that prior to the incident, because, there is no reference in his police statement that they had proceeded in a bullock cart and S.R.P. Constable Shivramsinh was also in their bullock cart. The evidence of this witness is also in conflict as to the damage caused to the rifle and the nature of injuries sustained by the S.R.P. Constable Shivramsinh. Surprisingly, this witness is silent as to Dhariya blow given on the head of S.R.P.

Constable Shivramsinh and also as regards the damage caused to the helmet put on by S.R.P. Constable Shivramsinh. There is no clear evidence as to the distance between the S.R.P. Point and the place of the incident. It is not the say of this witness that he was not knowing Bharwads of the accused side either by name or by face. Conduct of this witness also does not appear to be normal. Normally, S.R.P. Constable, if he is scolded by two females by raising shouts for help at S.R.P. Point, he would rush towards that direction. It appears that the S.R.P. personnel spent time in taking their 303 rifles and had not even attempted to rush towards the mob nor had they attempted to attend to the three persons who were lying there on the earth with bullet injuries. Normally, S.R.P. Constables posted at the Point were not supposed to act as persons working in favour of either group. At least, some of them could have attended the injured Bharwads of accused side, because, all of them had sustained bullet injuries and were also bleeding. Armed S.R.P. Constable could have been posted immediately by S.R.P. Head Constable Mangilal. Mangilal himself ought to have rushed to

the spot but this witness who claims to be the person who had reached the spot of incident immediately after the incident when the incident was nearly over, has not stated anything of the sort. The impression created in the mind of the Court is that this witness being a person on duty had failed to rush to the spot on call immediately in couple of minutes or seconds, and his deposition is found nothing but a face saving exercise. Undisputedly, this witness is not an eye witness. It will be difficult for this Court to accept that he had rushed to the spot immediately and had rescued the injured complainant and/or his uncle. It is not the say of the complainant that he does not know Roopsinh either by name or by face. He could have referred that Roopsinh had rescued them and had taken them to the S.R.P. Point and he, with the help of Mangilal had arranged to shift both the injured to the hospital. If they really made arrangements of shifting the injured complainant and his uncle Deva Sava to the L.G. Hospital, then, they could be the first person to reach the L.G. Hospital. Hospital record and other evidence run to the contrary and show that the

persons from the accused side had reached the L.G. Hospital earlier in point of time. Therefore, it was not advisable for the trial Judge to rely upon any part of the ocular evidence of P.W.1.

18. Evidence of one more S.R.P. Constable Dhoklaram Ramuram, [P.W.2 exh.27] is that he was also posted at S.R.P. Point at Piplaj on 20th May, 2007. Plain reading of the evidence of this witness as also other S.R.P. Constables examined shows that the new Group had taken over at the S.R.P. Point at Piplaj on 20th May, 1986. Therefore, as such, none of the S.R.P. Constables perhaps would have developed inimical terms with the accused side. While evaluating the evidence of S.R.P. Constables, defence version also is required to be kept in mind. Total eight persons were posted at the S.R.P. Point and they were sent at the spot in the Govt. vehicles. Second Grade S.R.P. Head Constable Mangilal was the Group Head. This witness has stated that smaller group of Bharwad community had demanded S.R.P. Point, but there is no evidence as to how many members were there in smaller group and how many

persons were forming larger group of Bharwad community. According to this witness, they were also informed about the rivalry between the two groups by the nearest Vatva Police Station and were also informed by the said Police Station that as and when members of smaller group of Bharwad go to their respective field or well, S.R.P.Constable should accompany persons of such group. They were also asked to see that small group is not assaulted. It is stated by this witness that on 23rd May, 1986, two Bharwads, namely, uncle and cousin were to go to their well, the uncle was with his wife and the complainant was with his sister. It is stated that S.R.P. Constable Shivramsinh had accompanied them to give them protection with his 303 service rifle. He had taken 20 cartridges and helmet with him. After some time, a Bharwad lady, that is, aunt and sister of the complainant had rushed to the S.R.P. Point and Bharwad girl, that is, sister of the complainant had informed the personnel that her uncle and brother were assaulted by the other group and the command of the S.R.P. Constable was not being obeyed by the mob. S.R.P. Head Constable Mangilal, therefore, ordered

this witness and other S.R.P. Constable Roopsinh and Dalpatsinh to go to the spot. This witness has stated that thereafter, they had got prepared and after taking their respective rifles and cartridges etc., had started to proceed towards the scene of the incident. It is stated that they had hardly walked about ten steps from the S.R.P. Point and at that time, they had heard sound of the gun shot. When they were proceeding further, they heard three such gun shots one after another, but on seeing them, the mob had scared and fled. This witness has stated that in that mob, there were males, females and even small children. According to this witness, he is not in a position to identify any of them who were there in the mob. It is stated by him that he had asked S.R.P. Constable Shivramsinh as to why he had fired, the said S.R.P. Constable Shivramsinh had told that the rival group of Bharwads had assaulted him also and therefore, he had fired. This witness has stated that he was told by S.R.P. Constable Shivramsinh that Dhariya blow was given on his helmet and that his life was in danger and therefore, he had fired from his gun. S.R.P. Constable Shivramsinh also told this

witness that Deva Sava, that is, the uncle and the complainant, his nephew had been assaulted by the other group. This witness has further stated that when they reached the spot of incident, he had seen three persons lying there on the earth. One person was moving through hands and legs and there was no movement of the body of the other persons. Out of the two, uncle had sustained injury on the head and the complainant-nephew had sustained injury on his back. It is stated by this witness that they were at the spot of the incident, mobile van had reached there and thereafter, P.S.I. Shri Khokhar had taken the helmet, service rifle, pent, shirt and empty cartridges from S.R.P. Constable Shivramsinh. He has stated that the pockets of the shirt of Shivramsinh were torn. Undisputedly, say of the prosecution is that muddamal rifle, helmet and clothes of S.R.P. Constable Shivramsinh were recovered by the investigating officer from S.R.P. Constable Shivramsinh in presence of the panchas, but this witness has stated that P.S.I. had recovered all these articles from S.R.P. Constable Shivramsinh. The word “Japt” used by this witness is to mean that the

articles narrated by this witness were seized by P.S.I. Shri Khokhar and this was done between 9.00 a.m. and 9.30 a.m. This witness has stated in the cross-examination that S.R.P. Constable Shivramsinh had put on other clothes after taking out from his bag and the used cartridges were recovered from Shivramsinh. At that time, Shivramsinh was asked to sit in the mobile van for some time. At that time, used cartridges were there in his hand. It is submitted by Mr. Mehta that this witness has tried to impress upon the Court that the used cartridges were in the hands of P.S.I. Shri Khokhar. Vernacular Gujarati word “TENA” should not be interpreted to mean Shivramsinh. It is the say of this witness that at that time, one or two Dhariyas were there at the spot of the incident and the police had recovered those Dhariyas. This incident had occurred on Piplaj road and the residential houses of the accused side were at a distance of about 50 to 60 feet. Some of the houses were at a distance of about 200 feet. Three persons who were lying there were at a distance of 10 to 15 feet from Pirana Road. This witness has expressed ignorance as to the spot where dead body

of Ghela Bechar was lying and has not accepted the suggestion that the same was lying near the house of Karman Khoda. It was between the house of Karman Khoda and Chaku Bechar. He has admitted that he had not seen both the dead bodies lying in a row, but according to this witness, both the dead bodies were lying in different directions. He has stated that the third person who was lying injured was at a distance of about 10 to 15 feet from the road. He had seen the blood stains on the earth, but he has not stated anything as to the distance between the spots of blood and Pirana Road. This Pirana Road, which is a part of State Highway was being used by both the groups. This witness has made one material improvement which goes to the veracity of this witness. He has admitted that he has not stated in his police statement that Shivramsinh had told him that as the assailant group of Bharwad had given Dhariya blow on his helmet and on the rifle, he had fired from his rifle. He has denied that he has not stated in the police statement that Shivramsinh had told him that other side had assaulted the uncle and the nephew. He has expressed his ignorance that

whether there is any thoroughfare from Pirana Road through Bharwad Vas. This witness also does not know about the direction of the well and the agricultural field of the uncle and the nephew, that is, Deva Sava and the complainant. He also does not know whether the road on which they were going leads to either well or agricultural field. He has admitted that these two persons were saying that they were in bullock cart. But this witness had not seen the bullock cart. The prosecution is totally silent as to what happened to that bullock cart. This witness had also not seen aunt and the girl accompanying both the injured uncle and the nephew. This witness has stated that after reaching the police station, he came to know that some females and children had also sustained injuries, but he was knowing as to how many number of such persons had sustained injuries. According to him, when he was at the spot of the incident, he learnt that about five persons had sustained injuries. This witness was also not aware that the injured persons from the complainant side were uncle and nephew and the girl was the sister of the injured. He learnt about this fact subsequently.

This witness claims to be the first person to reach to the police station. But for the reasons best known to P.S.O. on duty or this witness he has not filed any complaint, when one of the members of his group was assaulted and thereafter, he had reached the police station and that he was knowing that a serious offence had been committed and two persons were lying dead on the spot. Surprisingly, this witness has stated that he had not disclosed anything about the incident to any of the police officers who was there in the police station. Material improvement made by this witness and other facts stated during the course of the cross-examination makes the presence of this witness doubtful at the spot of the incident immediately after the act of the alleged assault. Of course, this witness has denied the suggestions made by the defence counsel as to the circumstances in which the accused side had suffered loss of life of two persons at the spot of incident and number of other had persons received bullet injuries including one child namely, Satish. This witness has denied that before the incident, in the morning, one S.R.P. Constable had gone to the house of Karsan Bhikha and

Bhura Jutha and had spat towards them and had attempted to provoke this people. At that time, Bhura Jutha had become angry and therefore, both of them were threatened by that S.R.P. Constable. This witness has also expressed ignorance about the remaining live cartridges and the bullets that were fired from the 303 rifle of Shivramsinh. This witness has not even tried to collect the fired bullets from the spot. He has stated that he does not know whether any bale of grass was lying near one of the injured nor had seen any house which can be said to be under construction. This version runs totally contrary to the panchnama of the scene of offence, because, panchnama of the scene of offence refers these two facts, that is, presence of bales of grass and the house under construction. The distance of blood stains narrated in the panchnama and the sketch produced by the prosecution also do not corroborate the say of this witness. Therefore, version of this witness ought not to have been accepted as a version of reliable person. It appears that this witness has suppressed the material fact and tried to improve the version with a view to save one of the

members of his group, that is, Shivramsinh. Status of this witness is of a person who can be said to be a partisan witness. He has not only made exaggeration but has also attempted to introduce two Dhariyas at the place where the incident had occurred. He claims that both these Dhariyas were recovered/seized by the police and the version of the investigating officer is totally to the contrary and as such, no Dhariyas are there as muddamal. Even if it is assumed that at the time of drawing of the panchnama these Dhariyas were taken away or removed, it is not possible for the Court to believe that such articles could have been removed by the accused side as S.R.P. Personnel were very well on the spot immediately after the incident. It is clear that he was knowing the topography of the place, that is, the location of the house of Karman Khoda and Vada land of Chaku Bechar. Even then, he has given the answer conveniently to the pointed question asked to him about the place where the dead body of deceased Ghela Bechar was lying. The police personnel are trained and they are atleast competent to decide the distance approximately in measurement of feet. He has also

stated that he was told by S.R.P. Constable Shivramsinh that as his life was in danger, he had fired from the rifle. In short, it is clear that this witness, though had reached the spot of the incident in a couple of minutes, as claimed by the prosecution, has attempted to keep curtain on many relevant crucial aspects and therefore, it will not be safe for the Court to accept the say of this witness.

19. The Court is conscious that it is the privilege of the Public Prosecutor that he may examine any of the prosecution witnesses in the sequence he intends to. But surprisingly, two material witnesses, namely complainant and S.R.P. Constable Shivramsinh, as per the say of the prosecution, have been examined as prosecution witnesses P.W.6 and P.W. 13 respectively. When the Court finds that important witnesses have been examined at a later stage, then, while evaluating the evidence, the Court should keep one aspect in mind that the decision of examining such important witnesses at a later stage is only an attempt to do

some patchwork and to cover up the mistakes committed by the other witnesses examined in reference to the case settled by the prosecution.

20. There is evidence of Pamiben Bhikhabhai, P.W. 3, who claims to be an eye witness. She has deposed that there was a quarrel between her father Bhikha Sava and one Vana Bhaga and the dispute was in relation to one Vada land and in that case, her father and brothers were convicted. After about one year of the incident of 1984, once she and her aunt, when they were going to their agricultural field, other side of Bharwads had pelted stones at them and, Dhani, wife of Chaku Bechar had given kick blow to one S.R.P. Constable, who was accompanying them. On the next day, she, along with her uncle Deva Sava and brother Karsan were going to their agricultural field and at that time, S.R.P. Constable was accompanying them on the request made by them. At that time, accused side had made assault. Ghela Bechar gave Dhariya blow on the left side of the head of her uncle Deva Sava and Chaku Bechar gave Dhariya blow on the shoulder of her brother Karsan Bhika. At

that time, Kanti Bechar, Hira Khoda and Rukhad Khoda had started giving lathi blows on S.R.P. Constable. She has stated that Ghela Bechar had given Dhariya blow on the helmet put on by the S.R.P. Constable and Chaku Bechar had given Dhariya blow on the rifle and because of that blow, wooden part of the rifle had broken. At that time, Lila Khoda and Bhura Jutha were shouting and instigating the assailants to kill the persons of the complainant side by uttering the words “Maaro... Maaro... Kaapo ... Kaapo”. The assailants had surrounded the S.R.P. Constable. They were about 50 to 60 persons and thereafter, S.R.P. Constable had fired in the air, even then, the mob had not dispersed and therefore, S.R.P. Constable had fired three rounds. After the rounds were fired against the persons of accused side, Chaku Bechar and Ghela Bechar had died on the spot and other 2 to 4 persons from the accused side had sustained injuries. She has stated that during this incident, she alone had gone to call other S.R.P. Personnel who were there at the Point and thereafter, two S.R.P. Constables came with her and they had reached the spot of the incident. By that time, the assailants

had fled from the spot. It is not the say of this witness that on seeing her and other two S.R.P. Constables, the mob had dispersed or remaining accused persons had fled from the scene. It was not easy for atleast other injured persons to run away from the spot and that too at a distance from where they could not even be caught. One of the accused Kanti Bechar, whose injury certificate is at exh. 57 shows that he had sustained three injuries and two of them were of the size of more than 5 x 1 x 2 cm bleeding injuries. One of these injuries was on the middle of parietal bone. Similarly, Jivan Bhoja had sustained serious injuries. On the day on which the injury certificate was given by the hospital on 1st July, 1986, the patient Jivan Bhoja was under the treatment of the hospital as injured patient. Even then, this witness Pamiben in her examination in chief claims that except two who were lying dead, others had fled. Close reading of the cross examination of this witness makes presence of this witness doubtful at the scene of the incident. She stated that the incident continued for about 10 to 15 minutes. She has not seen the injuries being

inflicted on the persons other than her uncle and brother. If she had not witnessed the incident of assault made on S.R.P. Constable Shivramsinh, who was accompanying them, then, how she could have witnessed the incident of assault on her uncle and brother. She has admitted that inimical terms between the two groups were existing since about 8 to 10 years. She claims that after hearing the sound of firing, they started running towards the place of the incident and at that time, her uncle, brother and S.R.P. Constable met them. All the three told them, that is, the witness Pamiben and two other S.R.P. Constables who were accompanying her, that everything was over. It appears that initially all of them had gone at the S.R.P. Point. No mark of violence was found on the body of this witness. In the cross examination, this witness has stated that the rifle of the S.R.P. Constable was not broken and nothing else had sustained damage. She has made material improvement in her deposition qua the role played by the accused Lila Khoda, Bhura Jutha etc. and this contradiction has been proved by the defence side. She claims that the S.R.P. Constable had fired when he was on the tar

road. In the cross examination, she has stated in para-4 of her deposition that she was not aware about the injuries sustained by the female members and children of the other side. Even on the date of the deposition, she was not aware that females and children also had sustained injuries in the incident in question. Though she claims that she had been to the L.G. Hospital, but she has expressed her ignorance as to when she had reached the L.G. Hospital. This witness has claimed that they were on the main road and the accused persons had come on the main road to intercept them. The road is straight. It was possible for her to see the accused from a distance of about 500 to 1000 steps. But she states that she had seen the accused persons when they were about 15 to 25 feet away. This version of this witness makes her presence at the spot of incident doubtful. She has also denied that the construction work of small rooms of Karman was going on. If the accused Ghela Bechar was so close to the S.R.P. Constable and if the blow that was allegedly given on the helmet of the S.R.P. Constable was prior to the bullet that was fired at him, then,

the deceased Ghela Bechar ought to have sustained the injury by a very close range firing. This is material contradiction between her examination in chief and the statement made by her before the police qua the act of Ghela Bechar of giving Dhariya blow on the helmet of the S.R.P. Constable. She has denied that she has stated in her statement before the police that both of them had stayed there on the spot of the incident and thereafter she had gone to call S.R.P. Constables. As per the admission of this witness, one can reach on Pirana Road from S.R.P. Point, which was situated in the vicinity of the residential houses, through one small tar road and the topography and the map produced by the prosecution do not indicate that the victims were supposed to pass through the residential area of the accused. It has come in the evidence that all the injured persons including the deceased belong to one family of Lila Khoda. One circumstances that has come on the record during the deposition of this witness Pamiben is that as per the compromise arrived at during the hearing of Criminal Appeal pending in the High Court challenging the order of conviction and

sentence passed against the father and brothers of this witness, Rs. 1,20,000/- were paid to the accused side and the complainant side was trying to extract that money back and therefore, they were pressuring the accused side. Of course, this suggestion has been denied that any pressure was being exerted upon the accused side for amount of Rs. 1,20,000/-. But other ample circumstances and the admission of other witnesses show that the accused side had received Rs. 1,20,000/- so that the father and brothers of this witness can come out of the jail on reduction of substantive sentence imposed. True it is that merely because, some witness has some inimical feeling towards the accused side, evidence of such witness should not be discarded solely on that count and the evidence of such witness should be scrutinized closely. During the close scrutiny of the whole evidence, it appears that the relations between the two groups were strained since the date of murder of Vana Bhaga on accused side on 6th June, 1984 and particularly from the date of conviction recorded by the Sessions Court qua the accused Bhikha Sava, that is, father of the witness Pamiben and her brother

Bhavan Bhikha. This witness does not say anything about the use of bullock cart. Material improvements made by this witness and clear conflict between the evidence of this witness and other evidence led by prosecution itself makes her evidence unreliable and the learned trial Judge ought not to have placed reliance on the evidence of this witness.

21. Evidence of P.W. 4 Imtiyazali Maksudali is regarding recovery of cloth of the complainant Karsan Bhikha. The police had recovered green T-shirt from the body of the present complainant Karsan Bhika in the presence of this panch when he was at L.G.Hospital in Maninagar. It was found torn from the right back side. Blood stains were shown to him. Neither S.R.P. Constable Shivramsinh nor Pamiben has stated in their deposition that in the assault, T-shirt of the complainant was torn. It is likely that somebody may have played mischief with the T-shirt. There is no reference as to the condition of the T-shirt in the panchnama. There is only reference as to one small hole which was found near the blood stains on the T-shirt. Therefore, it is not possible

for this Court to observe that this evidence adds any strength to the case of the prosecution. P.W. 5 Yusufali Bukhari has been declared hostile. This witness was examined to prove recovery of damaged rifle, cartridges and helmet along with open shirt of the injured S.R.P.Constable. Panchnama shows that these articles were submitted by P.W. 13 S.R.P. Constable Shivramsinh. But this witness has not supported the prosecution. As discussed earlier, when once cartridges were taken by P.S.I. Shri Khokhar from S.R.P.Constable Shivramsinh during the early hours on 23rd May, 1986, how could the same be with the witness at the time of drawing of the panchnama has not been explained. Therefore, this panchnama is not able to inspire confidence. One more aspect may be mentioned here that while sending the helmet to the F.S.L., atleast, the investigating officer ought to have raised a query whether it bore any indication or damage which could be caused by sharp edged weapon like Dhariya. This exercise has not been undertaken in the present case. The learned trial Judge ought not to have given much weightage in view of this aspect that helmet of a person on duty

was found damaged and that too when the said person was in uniform.

22. P.W. 6 Karsan Bhikha is the complainant and important injured witness. This witness has stated that as and when they went to their agricultural field, atleast one S.R.P. Constable was accompanying them from the S.R.P. Point provided to protect them. He has stated that in the year 1985, the accused persons had pelted stones on them, and S.R.P. Constable on duty at that point of time was assaulted by Dhaniben, wife of the deceased Chaku Bechar and that S.R.P. Constable was given a kick blow on his private part. For the reasons best known to that S.R.P. Constable, no formal complaint was lodged against anybody including Dhaniben. This witness has stated that in connection with that incident, a formal complaint was lodged by his sister Pamiben. There is nothing on record to show that what happened to the said so-called complaint. But this fact is satisfactorily brought on record to show that the accused persons were facing inimical feeling not only from the complainant side but probably also

from the S.R.P. Personnel. The learned trial Judge ought to have appreciated the evidence in this set of facts. This witness stated that the incident had occurred at about 8.00 a.m., and when they were proceeding towards their field and when they reached near the house of Lila Khoda, they were intercepted. Neither the two sketch maps and scene of offence panchnama nor even the investigating officer has stated that the complainant and the persons accompanying him including the S.R.P. Constable Shivramsinh were supposed to pass through the house of Lila Khoda. There is some force in the argument of Mr. Mehta that unless there is information or there is such clear suspicion, the S.R.P. Constable would not carry rifle with him and that too with helmet on his head. It is claimed by this witness that they were surrounded by a violent mob and the S.R.P. Constable was assaulted with Dhariya. He was also given Dhariya blow on his right shoulder and his uncle Deva Sava was given Dhariya blow on his head. There is nothing in the evidence of this witness which suggests that these blows were given by blunt portion of Dhariya or wooden portion of Dhariya

allegedly held by deceased Chaku Bechar and deceased Ghela Bechar. Medical certificate does not corroborate the version of this witness. It is stated by this witness that the mob was there to kill both of them, that is, the complainant and his uncle and therefore, S.R.P. Constable Shivramsinh rushed to their rescue and fired from his service rifle. It is stated that the first round was fired in the air by S.R.P. Constable Shivramsinh after the blow that was given to the uncle of the complainant, Deva Sava and two blows given to S.R.P.Constable Shivramsinh by Chaku Bechar and the Ghela Bechar. If these two deceased accused persons were able to give Dhariya blows, then, it is possible to infer that they must be at a short distance. But none of these two accused had sustained bullet injuries from close range of firing. It is clear that both the deceased had sustained bullet injuries on particular part of their respective bodies. If the S.R.P. Constable was really intending to save the complainant and his uncle, then, he could have fired one or two rounds initially so that the accused persons could sustain injury on the lower part of the body, that is, below

the waist. It appears that no such attempt was perhaps made by S.R.P. Constable Shivramsinh. This witness has not stated anything as to when the police party had come at the spot. He has also remained silent as to how they reached their respective homes or to the S.R.P. Point. This is in clear conflict with the evidence of P.W.3 Pamiben. This witness claims that they had reached the police station at about 10.00 a.m. to 10.30 a.m. and at that time, he had given a complaint. He claims that he had given the complaint in Vatva Police Station and not at the L.G. Hospital. Though he has claimed that there was a cut mark on the shoulder portion of his T-shirt and this cut was of the length of about 4 inches, there were no holes and the colour of the T-shirt was green. He has referred to a cloth as shirt, but the recovery made by the police is of T-shirt. He may have committed some mistake in narrating the type of the shirt that he had put on, but the recovery panchnama falsifies his version. Close reading of the cross-examination, mainly paragraphs 4, 5 and 6 of the deposition of this witness creates an impression that the complainant, his uncle and S.R.P. Constable

Shivramsinh had attempted to pass through the house of Lila Khoda and his area though there was no need for them to pass through that passage. As such, there is no thoroughfare from the residential area of the accused persons. The road leading to the agricultural field is via Pirana road and unless a group of persons comes on the highway, that is, Pirana road, the complainant could not have been intercepted or stopped. In that situation, number of independent persons passing through this road in the respective vehicles could have witnessed this incident. It has come in the evidence that because of the quarrel, for some time, traffic on Pirana road had stopped. This circumstance shows that some incident must have occurred in the residential area of the accused persons initially and thereafter, number of female members of the accused side perhaps had attempted to chase the complainant, his uncle Deva Sava and S.R.P. Constable who had invited the quarrel. To a pointed question asked to this witness, he has denied that the incident occurred near Vada land of deceased Chaku Bechar. Three blood spots mentioned in the sketch map and scene of offence panchnama falsifies

this version of the complainant. When it is the case of the prosecution that a complaint was given by the complainant at L.G. Hospital and that too at about 12.30 p.m., then, how the say of the complainant can be accepted that he gave complaint at Vatva police station and that too at about 10.00 a.m to 10.30 a.m. For the sake of argument, even if it is assumed that the complainant is right and he must have given some complaint initially between 10.00 a.m and 10.30 a.m. at Vatva police station, then, it can safely be argued by the defence side that the prosecution has suppressed these documents and there is no reference in the police station diary etc. about the rifle by the complainant, or his uncle or S.R.P. Constable Shivramsinh at the police station, and the story told by them to the P.S.O. on duty. On the contrary, the police station entry Exh. 12 relied upon by the prosecution contains the fact that the police station was informed about the incident by other agency and not by any S.R.P. Constable posted on duty at Piplaj, S.R.P. Constable, the complainant or his uncle. Evidence of Dr. Pradeep P.W. 17, who has proved the injury of Karsan Bhikha, the complainant, is in

clear conflict with the claim made by Karsan Bhikha, the complainant, in his oral evidence. The doctor does not speak anything about the cut mark noticed by him on the shirt put on by the injured. The complainant Karsan Bhikha had reached L.G. Hospital at about 11.10 a.m. He was examined by CMO of the Hospital, namely, Dr. Pradeep and the doctor had noticed two injuries, one was 6 x 2 cm. abrasion on the right shoulder. No depth is mentioned in the certificate Exh.66 qua the injury no.1. Other injury was seen on the right wrist and it was swelling. The doctor has denied that the injury examined by him could not be caused by sharp-edged weapon like Dhariya and such injury is possible either by stick or pipe or even by any substance. He states that if Dhariya blow is is given, then, firstly the cloth would get cut and thereafter the person would sustain injury. Here, nothing was noticed by the doctor. As claimed by the complainant, if his shirt or T-shirt had a cut mark of 4 inches, then, the corresponding injury ought to have been noticed by the doctor on the shoulder. On the contrary, because of the contusion, patient was sent for x-ray. The

doctor has not stated in his deposition that the wound was profusely bleeding. It is surprising that how the blood could be noticed on the T-shirt put on by the complainant at the time when the panchnama of the recovery of his shirt or T-shirt was drawn by the police. Blood of the complainant obviously was not taken or sent to FSL. Therefore, it would be risky for the Court to say that the blood that was noticed at the time of drawing of the panchnama in the form of stains, was really blood of the complainant. When it is possible to receive such injury voluntarily and when there is no reference of injury sustained by the complainant on the right wrist and the story unfolded by him, it would be risky for the Court to rely upon the evidence of such witness. Therefore, the learned trial Judge has committed grave error in relying upon the evidence of this witness. True it is that medical evidence is opinion evidence, but when it runs clearly contrary to the say of a witness and there are material improvements and contradictions in the deposition of such witness, then, as per the settled legal position, the evidence of such witness should not be

relied upon linking the accused with the crime.

23. It is not necessary to refer the entire evidence of Deva Sava or to comment on the evidence given by this witness, uncle of the complainant. His evidence is also contrary to the medical evidence, that is, medical certificate produced and proved by prosecution. No Dhariya blow was noticed by the doctor who examined this patient. It appears that as there was nothing like Dhariya blow on the body of the complainant, Deva Sava or S.R.P. Constable Shivramsinh, the investigating officer has omitted recovery of Dhariya and no Dhariya has been produced as muddamal before the Court. It is not the say of Deva Sava that Dhariya blow was given to him by the blunt portion of Dhariya. This witness has also made similar contradictions and improvements so that he can remain consistent with the complainant. This witness was most inimical to the accused side. He is also a partisan witness. It is interesting to note that when examined, the doctor noticed the following injuries on his body;

[i] CLW 6 x 1 x 1 c.m. on left parietal region.

[ii] CLW 3 x 1 x ½ cm on the right thumb.

[iii]Haematoma on right hand.

This shows that there was no injury on the body of Deva Sava which could be caused by Dhariya. This witness was examined by the doctor at 10.45 a.m. There is evidence on record to show that one police constable was there on duty at L.G. Hospital and more than one police personnel had already visited the hospital before 12.30 hrs, that is, at the time, when formal complaint of P.W.6 Karsan Bhikha came to be recorded. Even then, Deva Sava had not cared to disclose anything as to the incident. True it is that out of three injuries found on the body of Deva Sava, injury no.1 would not be self-inflicted or voluntarily received injury. This prosecution witness was supposed to prove to the satisfaction of the Court that the deceased accused had given Dhariya blow as alleged by him on his head. It appears that the quarrel was initiated from the complainant side by going in the residential area of the accused side and it is very likely that this

witness Deva Sava may have sustained some injury with hard and blunt substance on right parietal region while using the weapon that was in his hand. He may have sustained either two injuries on right hand, because, the other side would see that Deva Sava gives up the weapon that he is holding. Much more ought to have been stated by this witness Deva Sava, mainly qua the injury sustained by him on the right thumb and haematoma wound on the right hand as none of these two injuries could have been caused by any sharp-edged weapon. This witness claims that about 50 to 60 persons had assaulted them, and gives confused story as to the time of three bullets that were fired from the rifle by S.R.P. Constable Shivramsinh. It has come in the evidence of this witness that he belongs to sub-caste Gamar of Bharwad community and the accused persons belong to sub-caste Parhariya of Bharwad community. When it is admitted that about 70 houses of other Bharwad community of other sub-castes, that is, Gamar and Parhariya were there in their village and houses of these families were there on the road leading to the house of Lila Khoda, that is, the accused side, in such situation, the

prosecution could have examined persons as witness from other sub-caste of Bharwad to get corroboration to the version given by Deva Sava and the complainant. Deva Sava has also failed to explain as to how two persons were found lying dead in the residential area of the accused side. When this witness has not categorically stated that it was necessary for them to pass through the houses of the accused so as to reach their agricultural field, it is not possible for this Court to uphold the say of the learned trial Judge that the accused persons were really assaulted. Here, it would be relevant to refer to the relevant part of the scene of offence panchnama and two sketches of the place of the incident relied upon by the prosecution. As such two maps are there on the record, one of which is exhibited and has been received in evidence in the deposition of P.W. 28 Girdharbhai Ambalal Patel [Exh.87]. His services were requisitioned by the police under Yadi Exh.88 and thereafter, he had drawn map of the spot of the incident on the strength of the panchnama which was sent to him. One another map which was produced by the learned APP along with the

list of documents vide mark 29/20 is also mostly similar to the map Exh.89. However, Mr. Mehta has drawn attention of the Court qua relevant other areas found mentioned in the map Mark 29/20. The road leading from Ahmedabad to Pirana is north-south and the place of incident is on the eastern side of the road. Therefore, if a person intends to move towards Pirana from village Piplaj, he would not be required to drop down in the eastern direction. Residential area of the accused side is shown to be reasonably at a good distance. Width of entry of the road in Bharwad Vas of the accused persons was about 12 ft x 10 inches and that entry was at a distance of some feet after the Kachcha road leading to Pirana. It has come in the evidence that firing was made by the S.R.P. Constable when he was on the eastern tar road and distance between the edge of the Ahmedabad-Pirana tar road and the blood spot where the injured Jivan Bhoja was lying, was shown to be 55 feet. The distance between the dead body of Chaku Bechar and Ghela Bechar is not exactly mentioned in the map. It appears that this distance was more than 15 feet. The dead body of Ghela Bechar was lying at a distance of

17 feet from the place where injured Jivan Bhoja was lying and the distance between the injured Jivan Bhoja and dead body of Chaku Bechar is shown to be of 27-1/2 feet. It is not possible that both the deceased may have died with the hitting of one single bullet or Jivan Bhoja may have sustained injuries because of one of the bullets that had caused death of the two deceased, because, it is inferable from the difference of degree and distance that a fired bullet would travel in the direction of 180 degrees and the medical evidence suggests that the exit wounds of the bullet were bigger. The fact that either during the inquest or postmortem or spot panchnama there is no recovery of bullet or its residue at all from the body of the two deceased is found relevant. The learned trial Judge has not at all applied his mind to other different places which were found stained with blood, because, the blood stains were found in the area on the northern direction of one open place shown on the extreme east of the road entering the Bharwad Vas of the accused side. At three different places, blood stains were seen and one of such big spots of blood spread in 2

x 4 feet was at the doorsteps of the neighbour of the accused Rukhad Khoda. The incident has occurred practically on the land abutting the land of accused Karman Khoda and number of houses are shown in the sketch Mark 29/10. Thus, scene of the offence panchnama, if read in reference to the sketch map prepared by Girdharbhai A. Patel [P.W. 28], it is possible to infer that the map does not give exact picture of the spot of the incident except the blood stains and the distance between some of the blood stains that were noticed at the time of drawing of the panchnama. Therefore, the places shown in the map where blood was noticed by the investigating officer are the places where normally a bullet would not reach if a bullet is fired from tar road leading to Pirana. It is very likely that some of the injured may have taken cover/shelter by moving on the eastern direction and thereafter a little bit on northern side so that they may not sustain bullet injuries. Blood may be of the other injured persons including the accused persons. Surprisingly, the police has not attempted to notice bullet mark on any of the walls of the houses situated in the area nor from the

trees and other articles which were there. Executive Magistrate has drawn inquest panchnama at the spot of the incident prior to the panchnama drawn by the police during the investigation. The Executive Magistrate, who has prepared the inquest panchnama of the dead bodies was not supposed to mention the entire area where there were blood stains. But it is clear that the accused persons including two deceased sustained bullet injuries in their respective residential area where there is no thoroughfare and the police must have fired more than four rounds. There is no evidence on the record and it was possible to collect such evidence by the investigating officer by seizing relevant record and examining the higher authorities of the State Reserve Police Force authorized to allot arms and ammunitions to the S.R.P. Personnel, that actually how many live bullets were given to the S.R.P. Constables posted at the S.R.P. Point and how many of them were found live after the incident, otherwise, these many persons would not have sustained bullet injuries including the mark of passing of bullet through petticoat/Chaniya of one lady and injuries to

six persons. It is easy to infer that one bullet atleast had passed through that cloth and such low range fire would not cause injury on the upper part of the body of a person. Thus, the map and the scene of offence panchnama create a thick shadow of doubt as to the number of bullets fired from 303 service rifle of S.R.P. Constable Shivramsinh. It is very likely that some other police/S.R.P. personnel also may have fired from his rifle. Ballistic expert has opined that out of four used cartridges, three were fired from one weapon and one another, that is, article Exh.L-4 perhaps was fired from some other weapon. Of course, this is possible to infer from the opinion expressed by the ballistic expert. The expert has opined that Exh. L-1, L-2, L-3 and L-4 are fired/empty cartridges of 0.303 rifle. These articles were compared with the test-fired cartridges from the rifle Exh."K" and they were compared under the stereo microscope. Characteristic features of firing pin marks on Exh. L-1, L-2, L-3 and that on test-fired cartridges fired from rifle Exh."K" [that is, rifle of S.R.P. Shivramsinh used in the incident] were found similar thereby showing that Exh. L-1, L-2

and L-3 have been fired from Exh. “K”. Characteristic feature of firing pin mark on Exh. L-4 shows some similarity with the firing pin mark on test-fired cartridges test-fired from rifle Exh.”K”, but this was not sufficient to give a definite opinion whether Exh.L-4 has been fired from Exh. “K” rifle or not.

24. The above opinion indicates that perhaps one another similar 303 rifle may have been used and the prosecution has attempted to put curtain on it. The investigating officer, considering the number of persons found injured with the bullet injuries and that fact that petticoat[Chaniya] of Bai Kali was found having one hole that could have been caused by a bullet, ought to have taken detailed account as to the use of the number of cartridges immediately and rifle of each S.R.P. Personnel posted on duty would have been sent to FSL for examination. It is not necessary for the Court to comment that whether this omission was deliberate or was a bona fide mistake on the part of the investigating officer. The fact remains that some important evidence which could have helped the investigating officer to reach to a

correct finding for filing a charge sheet against the accused persons has not come on the record.

25. One intimation [Wardhi] [Exh.12] received at Vatva Police Station and recorded on page 179 shows that the police control room had informed Vatva Police Station that one Jamadar posted on duty at L.G. Hospital has conveyed that one incident of quarrel has occurred in the territory under Vatva police station and therefore, the police station should depute more number of police personnel in the L.G. Hospital and this request was made on the orders of the Resident Medical Officer of the hospital. Name of Jamadar – Sursing, Badge No. 2400 is mentioned on the face of the Wardhi as person on duty at L.G. Hospital and this was conveyed to Police Inspector Shri Kadri, the investigating officer. Prior to receipt of this intimation recorded on page 179, one entry is found in the record of the Vatva Police Station. These entries ought to have been given exhibit as they were produced at Mark 29/21 by the Public Prosecutor. The entry at page 177 was recorded at 9.00 a.m. The Wardhi indicates that

Shenubhai Bharwad, Ex-Sarpanch of Saijpur village [who was not examined as witness] had intimated that there was a quarrel between Bharwads of Village Piplaj and the S.R.P. Personnel and therefore, immediately, the police force may be sent. This was intimated to the control at about 9.10 hrs. through wireless set. It is also mentioned that the investigating officer is already intimated through police control. This entry shows that P.S.I. Shri Khokhar was asked to proceed towards village Piplaj and manage to reach the spot of incident. This document indirectly strengthens the argument of Mr. Mehta that P.S.I. Shri Khokhar had reached the spot of the incident even prior to 9.30 a.m., meaning thereby within about two hours, he had taken certain steps. When the complainant claims that he had been to Vatva police station between 10.00 a.m. to 10.30 a.m. and he had given complaint about the incident, then, there would not have been such big conflict between the facts revealed from the Wardhi recorded on page 177 at Vatva Police Station and the complaint recorded by P.I. Shri Kadri at L.G. Hospital, and the prosecution would not have kept curtain on the facts

disclosed by the complainant at Vatva Police Station at any time between 10.00 a.m and 10.30 a.m. If S.R.P. Constable Shivramsinh was really victim or he had seriously attempted to rescue two Bharwads, that is, the complainant and his uncle Deva Sava, then, he could have lodged complaint. It is in evidence that S.R.P. Constable Shivramsinh and complainant, both were sent to police station together as deposed by Police Inspector Shri Kadri and both of them were asked to go to the L.G. Hospital and thereafter, they have been examined by the doctor at hospital one after another. With a view to justify the act of recording of the complaint after long delay of about more than four hours, Police Inspector Shri Kadri has tried to find as excuse as to why no complaint was registered by the officers present at Vatva Police Station though none of the two injured was serious or bleeding profusely. It is possible to infer that S.R.P. Constable Shivramsinh must be present at the time when the complaint was recorded as he was present at L.G. Hospital along with the complainant.

26. F.I.R. Exh. 95 shows that the same has been

recorded in L.G. Hospital at about 12.30 p.m on 23rd May, 1986. It runs into five and half sides of full-scape paper bearing signature of Police Inspector Shri Kadri as “Police Inspector, Vatva Police Station”. Left thumb impression of complainant Karsan Bhikha was obtained thereunder. Now crucial question raised before the Court is that Exh. 95 ought not to have been considered as FIR and therefore, it cannot be read as FIR. As per the settled legal provision, if the Court is satisfied that Exh. 95 cannot be treated as FIR, then, it cannot be used even for the limited purpose.

27. On careful scrutiny of the record and proceedings, it is clear that the Report under Section 157 of the Code of Criminal Procedure was received by the Court very late, that is, on 2.6.1986 at 4.45 p.m. [presumably at 4.45 p.m.] This endorsement is on the top of the FIR received by the Court. Neither Police Inspector Shri Kadri-investigating officer, nor the prosecution side has tried to explain as to why such delay has occurred in sending the Report. Executive Magistrate, Ahmedabad

[P.W. 23, Exh.75] has deposed that on 23rd May, 1986, he was requisited to perform inquest panchnama of two persons who succumbed to the injuries sustained in the firing. He had received Yadi [Exh.76] which was signed by Police Inspector Vatva Police Station. This witness has stated that he had gone to perform inquest panchnama in presence of Panch Chhagan Shanaji and Kanti Viram Bharvad. He has stated that this panchnama is the very panchnama which is at Exh. 41. Panchnama Exh.41 clearly indicates that this panchnama was drawn between 12.30 and 1.00 hours, meaning thereby, the police had started process of investigation of crime much prior to the time of complaint Exh.95. This fact should be considered in the background of presence of P.S.I. Shri Khokhar on the spot of incident at any time between 9.10 a.m. and 9.30 a.m. What P.S.I. Shri Khokhar has done thereafter has not come on record at all, because he has not been examined nor any document is available on record which can give account of action taken by him.

28. When it is the evidence of the investigating

officer Shri Kadri that initially S.R.P. Constable Shivramsinh as well as the injured complainant had been to police station and thereafter, they were asked to proceed to L.G. Hospital so that they could be treated by the doctor, it will be difficult for the Court to accept Exh.95 as First Information Report. It is the say of Police Inspector Shri Kadri that both these persons along with other S.R.P. Personnel had come to Vatva police station in police van and as they were in need of urgent medical treatment, they were sent to L.G. Hospital [P.W.30 P.I.Shri Kadri Exh.94]. But as discussed earlier, as such, there was no grave injury on the body of any of these two persons. On the contrary, Dr. Dinesh Chandana [PW 19 Exh.69] has stated that S.R.P. Constable Shivramsinh had been to L.G. Hospital for treatment at 6.00 p.m. on 23rd May, 1986. Why S.R.P. Constable Shivramsinh has kept himself behind the curtain for such long time though he was sent by Vatva police station to L.G. Hospital immediately in the early morning, that is, between 9.00 and 9.30 a.m. The evidence of Dr. Dinesh Chandana falsifies the version of S.R.P. Constable Shivramsinh and

investigating officer Shri Kadri. Crucial muddamal articles including used cartridges and rifle of S.R.P. Constable Shivramsinh were not seized by the investigating officer till 17.15 p.m. Exh. 96 is the crucial document which poses a question as to whether till that time, S.R.P. Constable Shivramsinh was moving with these muddamal articles and if answer is in affirmative, then, what he was doing with all these articles till that time with conflicting version that P.S.I. Khokhar has seized it at 10.00 hrs. in the morning. Nature of damage on the rifle and the nature of injury seen by Dr. Dinesh Chandana on the thigh portion of S.R.P. Constable Shivramsinh creates clear doubt and it is possible to infer that this evidence may have been created to save S.R.P. Constable Shivramsinh who had taken imprudent and untimely decision to fire number of rounds from his 303 service rifle. It has come in evidence of the investigating officer Shri Kadri [Para-34 of Exh.92] that Police Sub Inspectors Devre and Solanki had reached the spot of incident at about 9.40 a.m. and during the investigation it was disclosed that both of them had reached the spot at about 9.25 a.m. He

has admitted that Yadi sent to the Executive Magistrate was sent after reaching at the L.G. Hospital and the same was sent through police constable at about 10.30 to 11.00 a.m. Of course, he has admitted that the time mentioned in the Wardhi is 9.10 a.m. He has admitted that though time of 9.10 a.m. is mentioned but the same was sent at about 10.00 a.m. According to him, he was informed at about 10.00 a.m. Thereafter, he had reached at the L.G. Hospital. Investigating Officer Shri Kadri has stated that he was at the police station. Two police officers of Vatva police station were on the spot of the incident. However, he has stated in paragraph-34 of his deposition that nobody had come before him to lodge the complaint. In short, there are ample facts and circumstances on record which are sufficient to lead to a conclusion that Exh.94 is nothing but result of the deliberations made between the time of incident that is, 12.30 p.m. and the complaint mentioned in Exh.95. The Court is not inclined to consider the FIR Exh.94 as FIR within the meaning of Section 154 of the Code of Criminal Procedure.

29. While dealing with the evidence of other witnesses, certain comments have been made on the evidence of P.W. 13 S.R.P. Constable Shivramsinh [Exh.51]. Conduct of this witness of not giving correct account of used 303 cartridges, actual time of use of the rifle to protect two Bharwads who were allegedly being accompanied by him, act of not lodging FIR at Vatva police station immediately after the incident and when he has opted not to go to L.G. Hospital though Yadi was very available with him till evening of 23rd May, 1986, makes evidence of this witness unreliable. Unlike other witnesses, he has not given true account of the incident nor as to the use of weapon by the accused side. He claims that about 50 to 60 persons had assaulted them with sticks and Dhariyas. But surprisingly, no injury on the front part of the body of S.R.P. Constable Shivramsinh was noticed by Dr. Dinesh. No incidental injuries were found that had resulted into tearing of his clothes. Similarly, it was possible for S.R.P. Constable Shivramsinh to receive injuries on his body at his request which could be equated with self-inflicted injuries. He has not given even the details

as to distance between him and both the deceased when he had actually fired from his service rifle. He has also kept silent about the arrival of the police officers, mainly Police Sub Inspector Shri Khokhar and has admitted to suppress the fact of recovery of used cartridges by the said Shri Khokhar from him. This witness has claimed that when he was present on the spot, police mobile had reached there with one P.S.I. It is possible to infer for this Court that it was P.S.I. Shri Khokhar. This witness claims that torn clothes, damaged helmet and rifle were shown to him and he had started process. But the panchnama of recovery of muddamal contradicts this witness. Similarly, non-examination of other police officers including P.S.I. Shri Khokhar and Solanki takes the evidence of this witness S.R.P. Constable Shivramsinh in great shadow of doubt. The learned trial Judge has committed grave error in accepting the version of S.R.P. Constable Shivramsinh that he was given Dhariya blow on his head and as he had put on helmet, blow had fallen on the helmet, meaning thereby, he was saved from that blow. True it is, that FSL report shows that the dent on the helmet could have

been caused by sharp-edged weapon. But in the present case, as Dhariya has not been recovered during the investigation, the prosecution could not establish by showing edged portion of any muddamal Dhariya to expert and could not obtain opinion whether edge of any muddamal Dhariya had any counter-effect on the edged portion. It is very likely that sharp-cutting instrument may have some evidence including coloured particles or the colour of the helmet on the edge. That report of the FSL after examining muddamal helmet under stereo-microscope, has opined that hit mark so found is caused because of the stroke given by the sharp-edged weapon. There are material contradictions, because, there is shadow of doubt as to use of sharp-edged weapon including Dhariya, one of the reasons for the same is that there is no recovery of such sharp-edged weapon including Dhariya as muddamal and as discussed, the accused had perhaps no opportunity to go close to the S.R.P. Constable and he had already fired one round in the air as per the case put up by the prosecution. There is one more circumstance that there was no injury on the head of the S.R.P.

Constable Shivramsinh even of superfluous nature that he would have sustained at the time when the alleged stroke was given by sharp-edged weapon on the helmet. S.R.P. Constable Shivramsinh was examined in couple of hours [i.e. in the evening] on the day of the incident and therefore the doctor examining him could have noticed some external injury on the head or forehead of S.R.P. Constable Shivrmasinh, but there is no such evidence. Plain reading of the deposition of S.R.P. Constable Shivramsinh does not inspire confidence at all. On the contrary, he has emerged as a person responsible for imprudent and reckless firing for the reasons best known to him. It appears that S.R.P. Personnel posted on duty at the S.R.P. Point at Piplaj were being obliged by the complainant side and there were incidents of quarrel even between S.R.P. Personnel and the accused side. It is pleaded by the defence side that one lady member of the accused side had given a kick to one S.R.P. Constable on his private part. What was the cause of the quarrel has not come on the record as the same was not categorically suggested to any of the prosecution witnesses. But it is in evidence that some complaints

were lodged by the complainant side and not by S.R.P. Constable about the quarrel that had taken place in the past. The Court is of the view that the learned trial Judge has committed grave error in accepting the say of S.R.P. Constable Shivramsinh linking the appellant accused with the crime.

30. The case of prosecution also ought to have been rejected on the ground that the prosecution has not examined Kaliben who was undisputedly present on the spot. She was neither made accused nor was she examined as witness. It is possible to infer that her statement must have been recorded by the police, then, why such crucial witness was dropped by the prosecution is the question that has remained unanswered till the conclusion. If the prosecution was not inclined to examine Kaliben, whose petticoat was showing a hole that could have been caused by passing of a bullet through it, or if she was not named as witness in the final report submitted under Section 173 of the Code of Criminal Procedure on the strength of the evidence available on record, the Court itself could have called Kaliben as witness

under Section 311 of the Criminal Procedure Code. A Presiding Officer of the Court has great role to play and on number of occasions, this Court and the Apex Court have criticized the Presiding Officers who have failed in exercising their jurisdiction vested in the Court under Section 311 or have failed to appreciate the evidence of witness so examined as Court witnesses. But in the present case, absence of evidence of Kaliben, according to me, goes to the root of the strength of the case of the prosecution.

31. Evidence of Police Inspector Shri Kadri runs into number of paragraphs but in most of the paragraphs, his version cuts the evidence of the witnesses examined by the prosecution or proves material improvements or contradictions made by such witnesses examined. Though there was enough opportunity and time with the investigating officer, certain crucial aspects have not been unearthed. Police Inspector Shri Kadri ought to have collected detailed account as to number of rifles allotted to S.R.P. Constables on duty at Piplaj Point. Also used cartridges or rifles allotted to the S.R.P. Personnel

posted on duty were required to be sent to FSL. Account of live cartridges could have been collected from the authorities of S.R.P. Force and relevant records could have been produced. There is no investigation as to how cartridges that were taken by P.S.I. Shri Khokhar went back to S.R.P. Constable Shivramsinh. Similarly, what were the facts stated by the complainant at Vatva police station as claimed by the complainant himself has not come on record. P.S.O. on duty at relevant point of time was important witness. It appears that he has also not been examined by the prosecution. After getting copies of post-mortem report, statements of doctors were required to be recorded to get assessment of the distance between the fire-arm and body of the two deceased as well as third injured which were lying there on the spot. Who shifted the third injured in the hospital and what was the initial version of the third injured person who was alive also has not come on the record. Unfortunately, as he was named as accused,theory of self-defence impliedly put up by the accused side and the version of the accused side in the statements under Section 113 of Code of

Criminal Procedure ought to have been considered objectively before accepting the version of the complainant, S.R.P. Constable Shivramsinh and Deva Sava, uncle of the complainant, as gospel truth. It is difficult even for this Court that prosecution witnesses corroborate each other. On the contrary, evidence of these witnesses is in conflict with each other if their oral evidence is considered qua other relevant aspects and medical evidence vis-a-vis time factors pointed out by the defence side. It emerges that time of incident has not been mentioned correctly. The incident must have occurred at about 7.00 a.m. and 7.30 a.m. and not between 8.00 and 8.30 a.m. Geographical distance between the place of the incident and Vatva police station as well as distance between the spot of the incident and L.G. Hospital etc., and also the distance between Vatva police station and L.G. Hospital etc. are considered keeping in mind the flow of traffic of city of Ahmedabad. Wardhi Nos. 117 and 179 which are at Exh. 112 could have been recorded between 9.00 a.m. and before 10.00 a.m.

32. One more infirmity that has come on record is that case papers of each injured patient have not been brought on record. It is possible for this Court to infer that each injured must have been asked about the history as to the cause of the injury. The prosecution has kept curtain on this aspect. Even the doctors have not mentioned in the respective medical certificate issued in all cases about the history given by the patient. If the investigating authority receives medical certificate without reference as to the cause of the injury, then, detailed certificate could have been called for or Public Prosecutor, atleast, could have attempted to produce the case papers of treatment of all injured persons including the injured persons from the accused side. Photographs produced by prosecution have not been correctly proved. Even otherwise, in light of the two sketch maps produced, these photographs which are on the record would not have carried the case of the prosecution any further. On the contrary, if the photographs are considered, then, they falsify the version of injured witness P.W.9 Deva Sava, because, he claims that he had not informed the

police officer, who arranged for shifting of the injured prosecution witness to Vatva police station and then to L.G. Hospital, about the sequence of the incident. According to P.W. 9 Deva Sava, the police had not asked him as to how the incident had occurred. He claims that blood stains were found on the road, that is, the road leading to Pirana. Neither the photographs nor sketch maps support this version. There is material contradiction that has been proved to the effect that while giving his statement before the police, he had not mentioned the number of persons who had allegedly assaulted them, that is, 50 to 60 persons. Even if mob of 50 to 60 persons had pelted stones, then, such scenario could have been reflected in the scene of offence panchnama and the photographs.

33. It is on record that Sarpanch of village was the first person who informed the police about the incident and the mobile van reached the spot on call of the Sarpanch. P.S.I. Devre [P.W.14 Exh.52] claims that after 8.00 a.m. on 23rd May, 1986, he was in charge of mobile van and was on duty near village

Jetalpur. At that time, at about 9.02 a.m., he received a message from the City police control that there was a quarrel between Bharwad community persons and S.R.P. Personnel at village Piplaj and that firing had taken place. On receipt of this message, he had reached at village Piplaj immediately. But before he could reach at Piplaj, P.S.I. Shri Khokhar had already reached there along with other police officers. S.R.P. Constable Shivramsinh was also present there. He has stated that he had not seen any weapon, that is, either Dhariya or lathi etc lying on the spot of the incident. He has stated that the investigating officer Shri Khokhar was present along with other police officers. Evidence of this witness makes one aspect very relevant, that is, non-examination of P.S.I. Shri Solanki and Shri Khokhar which also goes to the root of the story told by the complainant in his complaint at 12.30 p.m in the L.G. Hospital about the assault made by the accused side on S.R.P. Constable Shivramsinh. This fact situation has not been dealt with by the learned trial Judge. Similarly, there is no reasonable and logical explanation from the prosecution as to how blood

stains were found at the doorsteps of the houses of the accused persons and why there was no blood on the road though which the prosecution witnesses were passing to Pirana road, that is, the main road.

34. S.R.P. Personnel were posted in the maholla of residential area of the complainant and there was no reason either for the S.R.P. Constable or the complainant side to pass through the residential houses of the accused side. Therefore, there was no scope of quarrel taking place unless the attack by the accused side was planned. It is not possible for this Court to infer that planned attack was made otherwise, the incident could have occurred on Piplaj Road and not in the residential area of the accused persons. The injuries found on the body of the third injured and other witnesses appear to be of grave nature as they were bullet injuries and it was not possible for them to escape from the spot. At the most, they could have reached their respective house with the help of other neighbours and relatives. On the contrary, the scenario emerging from the facts shows that the injured were not in group but were

away from the group. If it was a planned attack, males and females would not have carried their children with them. The injury sustained by one child positively proves that children also must have been there. On the contrary, theory of motive goes against the prosecution, because, it is the say of the defence that the complainant side were trying to get amount of Rs. 1,20,000/- back from the accused side and therefore, the complainant side may have attempted to attack. Thus, basic story placed by the prosecution is found unbelievable. Evidence of Shivramsinh and Dhoklaram, both S.R.P. Constables does not inspire confidence. On the contrary, S.R.P. Constables Shivramsinh or Dhoklaram, both could have led cogent evidence which could justify the use of 303 service rifle. Recovery of muddamal Dhariya was legal obligation on the part of the prosecution and the prosecution has failed in doing so. If the rifle was really broken prior to firing, then, S.R.P. Constable Shivramsinh could not have fired bullet from the broken 303 rifle. Actually, rifle was never broken and some superfluous damage was found thereon at the time of drawing of recovery panchnama of the

said rifle. Case of the prosecution appears to be tailor-made case and the real victims have been posed as accused before the Court. There is enough force in the argument of Mr. Mehta that only interested witnesses have been examined by the prosecution and that even Police Inspector Shri Kadri was also interested in taking out the S.R.P. Constable Shivramsinh from the wrong committed by him. Police Inspector Shri Kadri ought to have acted objectively. He could have atleast named P.S.O. on duty at Vatva police station who received the message for the first time in the police station and had arranged for shifting two injured persons, namely S.R.P. Constable Shivramsinh and the complainant to the L.G. Hospital. The prosecution has not explained as to how there could be a fresh injury on the body of S.R.P. Constable Shivramsinh when he was examined after about ten hours from the alleged time of the incident. It is also relevant to note that the complainant Karsan Bhikha was discharged from the hospital on the very day, that is, on 23rd May, 1986. Therefore, as such, his status in the hospital can be said to be of outdoor patient. He had reached the

hospital at 11.10 a.m. Prior to that, persons from the accused side were already there in the hospital and the R.M.O. only had informed the police to make necessary arrangement to maintain law and order in the hospital. Even then, none of the prosecution witnesses, mainly, either S.R.P. Constable Shivramsinh or Deva Sava or complainant Karsan Bhikha have attempted to explain the injury on the persons of the two accused who succumbed to their injuries on the spot. Number of other neighbours residing in the same area have not been examined by the prosecution otherwise atleast they could have explained as to how Karman Khoda and three other women had sustained injuries. One of the accused, namely Jivan Bhoja had died subsequently and his dying declaration was recorded. There is no element of extra-judicial confession in the statement made by Jivan Bhoja otherwise, prosecution would have placed its case accordingly. Thus, this is a case where crucial part has not been mentioned in the basic story placed before the Court.

35. Self-defence is the theory of the defence

and it cannot be a case of prosecution which is one of the alternative arguments advanced by Mr. Mehta. It was the say of S.R.P. Constable Shivramsinh that he opened fire to save himself and other two but as such, when there is no evidence of cogent nature to show that any of these three persons were intercepted and assaulted initially by the accused persons with mob of about 50 to 60 persons, then, such theory placed by the prosecution should be thrown out. On the contrary, the prosecution should be criticized. This Court should observe that this is a fit case where the government ought to have ordered some compensation to the victims of reckless and unwarranted firing made by S.R.P. Constable Shivramsinh.

36. As observed by the Court, the accused persons were the victims and there was no scope for them to formulate an unlawful assembly. Female members and children were not found members of unlawful assembly and two of the accused persons had succumbed to the injuries on the spot. The totality takes this case to a conclusion that though there was

no evidence as to existence of unlawful assembly, the conviction recorded by the learned trial Judge on this ground is not found sustainable in the eye of law.

37. Though Mr. Mehta has argued that this Court, in exercise of inherent powers vested in the Court, should direct the government to pay some compensation to the injured victims and family of the three deceased, but it would not be either legal or proper for this Court to pass such order as this Court is not dealing with Special Criminal Application either under Section 482 of Code of Criminal Procedure and/or under Article 226 of the Constitution of India. Criminal Procedure Code provides for compensation to the victims of the crime and at the conclusion of the trial, the Court under the scheme of the Code of Criminal Procedure cannot award compensation to the accused side while acquitting them. At the most, the Court can observe that actually they have been wrongly implicated in the crime and they were the victim of the assault. It is obviously open for the injured victims either

to claim compensation from the government, or as the wrong is mainly committed by the S.R.P. Constable Shivramsinh it will confer right to the injured victims to prosecute the complainant Karsan Bhikha, his uncle Deva Sava and S.R.P. Constable Shivramsinh for putting a tailor-made false case to save their skin with the help of the police officers of Vatva police station if otherwise legally entitled. This would need independent proceedings and therefore, this part of the argument made by Mr. Mehta cannot be acceptable.

38. For the reasons aforesaid, the present appeal is hereby allowed. Order of conviction and sentence dated 7th August, 1993 passed by the learned Additional Sessions Judge, Ahmedabad [Rural] in Sessions Case No.101 of 1988 is hereby quashed and set aside. All the appellants are acquitted from all the charges levelled against them. All the accused shall be released forthwith, if they are not required in any other offence. Amount of fine paid, if any, shall be refunded to the respective appellant-accused on proper identification. As there is no acquittal

appeal by the State against the persons who were acquitted by the learned trial Judge, the Court is not supposed to make any comment on the operative part of the judgment under challenge. However, it is relevant to note that no good and logical reasons are coming forth from the judgment under challenge as to why and in what circumstances, the accused persons have been separated in two groups though their physical presence at the spot was natural and nine of them were injured. Therefore, on the same ground,the present appellants were also required to be acquitted.

39. In short, the appeal is allowed. Bail bonds executed by the appellants-accused stand discharged. Order and direction accordingly.

[C.K. BUCH, J.]

pirzada/-